TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 896.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HARRY A. BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MARCH 17, 1916.

(24,618)

(24,618)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 399.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HARRY A. BROWN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court, at Oklahoma City, this 5th day of March, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

1 Filed Feb. 19, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

No. —.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Citation on Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Harry A. Brown, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein the St. Louis and San Francisco Railroad Company is plaintiff in error, and you, Harry A. Brown, are defendant in error, to show cause, if any
2 there by, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness, The Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this 18 day of Feb'y, A. D. 1915.

M. J. KANE,
Chief Justice of Supreme Court of State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of State of Oklahoma.

By —— ——, *Deputy.*

OKLAHOMA CITY, OKLA., Feb. 19, 1915.

We, the undersigned attorneys of record for defendant in error in the above entitled cause, hereby acknowledge service of the above citation, and enter our appearance in the Supreme Court of the United States.

STUART, CRUCE & CRUCE,
Attorneys for Defendant in Error.

3 Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioner, the St. Louis and San Francisco Railroad Company, respectfully shows that on the 22nd day of May, 1914, the Supreme Court of the State of Oklahoma entered a judgment herein in favor of defendant in error and against plaintiff in error, in which said judgment and proceedings had prior thereto in this cause
4 certain errors were committed, to the prejudice of this petitioner; all of which more in detail appear in the assignment of errors filed with this petition.

That after the rendition of said judgment, and on the 6th day of October, 1914, your petitioner filed a petition for rehearing; that thereafter, on the 22nd day of December, 1914, an order was made by this Court, denying said petition for rehearing. Thereupon, an opinion was filed in this cause by this Court, affirming the judgment of the District Court of Carter County, State of Oklahoma, which opinion is a part of the record in this cause.

And your petitioner, the defendant below, respectfully shows that there was a judgment in said cause in the District Court of Carter County, State of Oklahoma, in favor of the defendant in error and against your petitioner, in the sum of Sixteen thousand, nine hundred ($16,900.) Dollars, and the costs of suit, with interest thereon from the date of said judgment at the rate of six (6%) per cent. per annum; which said judgment, upon appeal to the Supreme Court of the State of Oklahoma, was affirmed by said court.

And your petitioner further respectfully shows that the said Supreme Court of the State of Oklahoma is the highest court of the state of Oklahoma in which a decision in said cause could be had; and your petitioner claims the right to remove said cause to the Supreme Court of the United States by writ of error, under the Statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court
5 of the State of Oklahoma, and the proceedings in said cause, certain errors were committed, to the prejudice of your petitioner; all of which will more in detail appear from the assignments of error which are filed with this petition.

And because by said judgment of the Supreme Court of the State of Oklahoma there was denied to your petitioner a right, title, privilege or immunity claimed by your petitioner in the proceedings in said cause, under the Constitution of the United States, and under the several Statutes of the United States, and an authority exercised under the United States;

And because your petitioner claimed in said cause that, under the Employers' Liability Act, the same being: "An Act Relating to the liability of common carriers by railroad to their employés in certain cases," approved April 22, 1908, and the Amendment thereto, approved April 5, 1910, all twelve of the jurors empaneled, selected, and sitting in said cause should have concurred in the verdict returned therein, whereas, only nine of said jurors so concurred in the verdict returned; and that the only right or remedy of said defendant in error to enforce a liability against your petitioner for an injury alleged to have been sustained while in the regular employ of plaintiff in error, which, it is alleged, was engaged in interstate commerce, was that conferred by the Act of Congress above referred to; and that said right or remedy so provided was and is exclusive of and superseded all rights or remedies existing by virtue of any previously existing State Statute, Constitution, or regulation, which said claim of a right, title, or immunity under said Act of
6 Congress and the Amendment thereto, was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma.

And because your petitioner claimed in said cause that it was entitled to interpose in said cause, as a defense to defendant in error's alleged cause of action the defense of assumption of risk, and claimed that defendant in error's alleged cause of action did not grow out of the violation of any statutory duty owing by plaintiff in error to the defendant in error. But this Court, in the opinion affirming the judgment of the lower court, say:

"* * * Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress, the rule seems to be that the assumption of risk is not a defense; and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the court would have been warranted in submitting this issue to the jury. The fact that the court may have committed error in charging the jury

on this point, under such circumstances, would not warrant a reversal."

Which holding by the Supreme Court of the State of Oklahoma denied to your petitioner said claim of a right, title or immunity under said Act of Congress and the Amendment thereto, above referred to.

And because your petitioner claimed that, while defendant in error's petition stated a cause of action under both the Employers' Liability Act, above referred to, and under the Safety Appliance Act of Congress, approved March 2, 1893, when the trial court, at defendant in error's request, instructed the jury as follows:

"You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in
7 whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

his cause of action, under the last named Act of Congress, fell; and that all of his evidence in support thereof necessarily fell with the abandonment of that charge of negligence; that it conclusively appeared from the remaining evidence that his injury was due to an assumed risk, and the trial court should have so held, as a matter of law; which claim of a right, title or immunity under said Act of Congress, and the amendments thereto, was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma.

And because your petitioner in said cause claimed that when defendant in error abandoned and withdrew his charge of negligence growing out of an alleged violation of the Safety Appliance Act, above referred to, it was then entitled to interpose the defense of assumed risk, under the Employers' Liability Act, above referred to, and to have the jury properly instructed upon this defense; which claim of a right, title or immunity under said Act of Congress, and the Amendments thereto, was denied your petitioner by said judgment of the Supreme Court of the state of Oklahoma.

And because your petitioner in said cause claimed that, if the jury found that the defendant in error was guilty of negligence contributing to his injury, the duty of the jury to diminish the damages in proportion to the amount of negligence attributable to said defendant in error was mandatory and imperative; which claim of a right, title or immunity under said Act of Congress, and the Amendment thereto, was denied your petitioner by the judgment of
8 the Supreme Court of the State of Oklahoma.

And because your petitioner claimed in said cause that it was entitled to have the jury instructed upon the meaning of the word "proportion" as used in the Employers' Liability Act, above referred to; which said claim of a right, title or immunity under said Act of Congress, and the Amendment thereto, was denied your petitioner by the judgment of the Supreme Court of Oklahoma.

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"13.

"If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. (Excepted to by defendant; S. H. Russell, Judge)."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"18.

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant. Excepted to by defendant, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"19.

"Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"6.

"You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the

trial court did not commit error in refusing to give to the jury the following instruction:

"12.

10 "If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3, of the Act of Congress, of April 22, 1908, U. S. Stat. L. p. 66, which is as follows:

'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'

The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion,' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute, we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such a part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But, if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or

11 just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict."

And because your petitioner claimed in said cause that the Su-

preme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"17.

"You are instructed that if you find from the evidence that plaintiff, at the time of his alleged injury, was not employed in interstate commerce by the defendant, as defined in instruction No. 8, then, and in that event the contributory negligence of the plaintiff would be a complete defense to this action, regardless of the negligence of the defendant; that is, even though the plaintiff was injured as a result of the negligence of the defendant, yet if the plaintiff failed to exercise that degree of care which an ordinarily prudent man would exercise, as the result of which he was injured, this would constitute contributory negligence and he could not recover.

"The violation by the plaintiff of any of defendant's rules in force at the time, which contributed to his injury, would constitute contributory negligence.

"It was the duty of the plaintiff to operate the coupler on the cars in question by the lever provided for that purpose at the side of the car, without going upon the track or between the ends of the cars. It was his duty to avoid the dangerous way of adjusting or preparing these couplers for impact, and to use a safe way. If he chose a dangerous way and was injured as a result thereof, he would be guilty of contributory negligence and could not recover. Refused, Defendant excepts, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"18.

"If you find from the evidence that the plaintiff was not employed in interstate commerce at the time of the injury, as hereinbefore defined, and you find that he was injured by reason of the
12 car running over him after he had given the engineer of the train a signal to back, or if you find that the plaintiff went on the track in front of a moving car, in violation of a rule of the defendant; or if you find that the plaintiff went on the track to adjust the coupler of a car, whether such car was moving or not, when he could have operated it by remaining outside of the track; or, if you find that plaintiff went into a place of danger where he was not required to be, or if you find that he was injured as a direct result of violating any of the rules of the defendant, in force at that time, then, and in that event he would be guilty of contributory negligence and could not recover, even though the defendant was negligent. Refused, Defendant excepts. S. H. Russell, Judge.

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"19.

"If you find that the plaintiff was not employed in interstate com-

merce at the time of the alleged injury, as hereinbefore defined, then and in that event the defense of contributory negligence and assumption of the risk would both be available to the defendant, and the plaintiff could not recover, regardless of the negligence of the defendant, if you find that he was guilty of contributory negligence as defined in these instructions, or if you find that he was injured as the result of a risk assumed by him, incident to his occupation, as defined in these instructions. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"22.

"You are instructed that if you find from the evidence that the proximate cause of the injury of the plaintiff was that he stumbled or slipped and fell while walking or running on the track
13 of the defendant in front of the car he was engaged in switching, and you find that the risk of stumbling or slipping and falling while so engaged is incident and usual to the occupation of brakeman, then and in that event the plaintiff would be deemed to have assumed such risk by engaging in such employment and in continuing in the service of the defendant, and would not be entitled to recover. Refused, Defendant Excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"24.

"If you find from the evidence in this case that the plaintiff was not employed in interstate commerce at the time of the accident, as hereinbefore defined, even though you further find that he was injured by reason of the engineer of the defendant backing a car over the plaintiff, this would not entitle the plaintiff to recover, unless you further find that he was rightfully on the track in front of the car. If there was no necessity for the plaintiff to go on the track in front of the car, or if he was prohibited from so doing by the rules of the defendant company, then he would have no right to go upon the track and, if he was injured by reason of so doing, he would be guilty of contributory negligence, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"28.

"You are instructed that if you find that the plaintiff is entitled to recover under the instructions heretofore given you, then it becomes your duty to ascertain the amount of damages to which
14 he would be entitled. The damage which you can assess should be compensatory only, and should be reasonable, and not

excessive. In determining these, you may take into consideration the pain and suffering of the plaintiff, both physical and mental, loss of time from the pursuit of his occupation, and, if you find that his injuries are permanent, decrease of his earning capacity; and from these considerations you should fix such sum as in your judgment would be a fair and just compensation for the injuries received, not exceeding the amount sued for in the petition. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the damages awarded the defendant in error were not excessive.

Wherefore, Your petitioner claims and says that by a final judgment in a suit in the highest court of the State of Oklahoma, in which a decision in said cause could be had, there was a right, title, privilege or immunity which was specially set up or claimed under the Constitution of and under the Statutes of the United States by your petitioner; and the decision of said court was against such right, title, privilege or immunity which was so specifically set up and claimed by your petitioner under such Constitution and such Statute. And wherefore, and in accordance with the Statutes in such cases made and provided, your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files, and papers in this cause, duly authenticated,
15 may be sent to the Supreme Court of the United States.

And your petitioner prays for the allowance of a citation in due form of law; and your petitioner will ever pray.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Petitioner and Plaintiff in Error,

By W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Its Attorneys.

16 Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. —.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Assignments of Error.

Comes now the St. Louis and San Francisco Railroad Company, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to its prejudice, which are apparent from the record therein; that the errors committed by the trial court and affirmed by the Supreme Court of the State, and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

17 I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, state of Oklahoma.

II.

The Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Carter County, state of Oklahoma.

III.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause; and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, was not exclusive of the Constitution, laws, and regulations of the state of Oklahoma, as to actions prosecuted under said Act.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error grew out of a violation of a statutory duty, arising under an Act of Congress; and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not
18 abandon and withdraw all his testimony respecting such alleged violation of said Statute.

VI.

The Supreme Court of Oklahoma erred in holding that after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

VII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"13.

"If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. Excepted to by defendant, S. H. Russell, Judge."

VIII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"18.

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are
19 instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant. Excepted to by defendant, S. H. Russell, Judge."

IX.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"19.

"Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree, and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

X.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"6.

"You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce."

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"12.

"If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:

'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributed to such employe.'

"The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in statute we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to

describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict. Refused, Defendant excepts. S. H. Russell, Judge."

21 XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"17.

"You are instructed that if you find from the evidence that plaintiff, at the time of his alleged injury, was not employed in interstate commerce by the defendant, as defined in instruction No. 8, then and in that event the contributory negligence of the plaintiff would be a complete defense to this action, regardless of the negligence of the defendant; that is, even though the plaintiff was injured as a result of the negligence of the defendant, yet if the plaintiff failed to exercise that degree of care which an ordinarily prudent man would exercise, as the result of which he was injured, this would constitute contributory negligence and he could not recover.

"The violation by the plaintiff of any of defendant's rules in force at the time, which contributed to his injury, would constitute contributory negligence.

"It was the duty of the plaintiff to operate the coupler on the cars in question by the lever provided for that purpose at the side of the car, without going upon the track or between the ends of the cars. It was his duty to avoid the dangerous way of adjusting or preparing these couplers for impact, and to use a safe way. If he chose a dangerous way and was injured as a result thereof, he would be guilty

of contributory negligence and could not recover. Refused, Defendant excepts. S. H. Russell, Judge."

XII.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"18.

"If you find from the evidence that the plaintiff was not employed in interstate commerce at the time of the injury, as hereinbefore defined, and you find that he was injured by reason of the car running over him after he had given the engineer of the train a signal to back, or if you find that the plaintiff went on the track in front of a moving car, in violation of a rule of the defendant;
22 or if you find that the plaintiff went on the track to adjust the coupler of a car, whether such car was moving or not, when he could have operated it by remaining outside of the track; or, if you find that plaintiff went into a place of danger where he was not required to be, or if you find that he was injured as a direct result of violating any of the rules of the defendant, in force at that time, then and in that event he would be guilty of contributory negligence and could not recover, even though the defendant was negligent."

XIII.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"19.

"If you find that the plaintiff was not employed in interstate commerce at the time of the alleged injury, as hereinbefore defined, then and in that event the defenses of contributory negligence and assumption of the risk would both be available to the defendant, and the plaintiff could not recover, regardless of the negligence of the defendant, if you find that he was guilty of contributory negligence as defined in these instructions, or if you find that he was injured as the result of a risk assumed by him, incident to his occupation, as defined in these instructions. Refused, Defendant excepts. S. H. Russell, Judge."

XIV.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"22.

"You are instructed that if you find from the evidence that the proximate cause of the injury of the plaintiff was that he stumbled or slipped and fell while walking or running on the track of the defendant in front of the car he was engaged in switching, and you

find that the risk of stumbling or slipping and falling while so engaged is incident and usual to the occupation of brakeman, then and in that event the plaintiff would be deemed to have assumed such risk by engaging in such employment and in continuing in the service of the defendant, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

23 XV.

"24.

"If you find from the evidence in this case that the plaintiff was not employed in interstate commerce at the time of the accident, as hereinbefore defined, even though you further find that he was injured by reason of the engineer of the defendant backing a car over the plaintiff, this would not entitle the plaintiff to recover, unless you further find that he was rightfully on the track in front of this car. If there was no necessity for the plaintiff to go on the track in front of the car, or if he was prohibited from so doing by the rules of the defendant company, then he would have no right to go upon the track and, if he was injured by reason of so doing, he would be guilty of contributory negligence, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

XVI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"28.

"You are instructed that if you find that the plaintiff is entitled to recover under the instructions heretofore given you, then it becomes your duty to ascertain the amount of damages to which he would be entitled. The damage which you can assess should be compensatory only, and should be reasonable, and not excessive. In determining these, you may take into consideration the pain and suffering of the plaintiff, both physical and mental, loss of time from the pursuit of his occupation, and if you find that his injuries are permanent, decrease of his earning capacity; and from these considerations you should fix such sum as in your judgment would be a fair and just compensation for the injuries received, not exceeding the amount sued for in the petition. Refused, Defendant excepts, S. H. Russell, Judge."

24 XVII.

The Supreme Court of the State of Oklahoma erred in holding that the damages awarded the defendant in error were not excessive.

For which errors the said St. Louis and San Francisco Railroad Company, plaintiff in error, prays that the said judgment of the Supreme Court of the State of Oklahoma, and of the District Court of Carter County, State of Oklahoma, be reversed, and judgment

rendered in favor of the plaintiff in error; and for such other and further relief as to the Court may seem just and proper, and for its costs.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

25 In the Supreme Court of the United States and in the Supreme Court of Oklahoma.

Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Order Allowing Writ of Error.

Let the writ of error issue as prayed for upon the execution of a bond by the St. Louis and San Francisco Railroad Company, payable to Harry A. Brown, in the sum of $40,000.00, with good and sufficient sureties, approved and conditioned as provided by law, such bond when so approved to operate as a supersedeas bond.

Dated at Oklahoma City, Oklahoma, this 5 day of February, 1915.

[SEAL.]

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
WILLIAM M. FRANKLIN,
Clerk Supreme Court Okla.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

26 Filed Feb. 19, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, or some of you, the highest court of law or equity in said State in which a decision could be had in said suit between the St. Louis and
27 San Francisco Railroad Company, plaintiff in error, and Harry A. Brown, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute or of an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States — was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said
28-30 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 19th day of February, A. D. 1915.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk United States District Court for the Western District of Oklahoma.

Approved and allowed by the Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

* * * * * * *

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of State of Oklahoma.

31 (Filed Jun- 11, 1913. W. H. L. Campbell, Clerk.)

In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Petition in Error.

The St. Louis & San Francisco Railroad Company, plaintiff in error, complains of the said defendant in error, for that the said Harry A. Brown, at the — term of the District Court of Carter County, state of Oklahoma, recovered a judgment by the consideration of said court against the St. Louis & San Francisco Railroad Company, in a certain action then pending in said court wherein the said Harry A. Brown was plaintiff and the said St. Louis & San Francisco Railroad Company was defendant; the original case-made duly certified and attested is hereunto attached, marked exhibit "A," and made a part of this petition in error.

32 And the said St. Louis & San Francisco Railroad Company avers that there is error in said record and proceedings in this, towit:

I.

Irregularity in the proceedings of the court and abuse of discretion by which said plaintiff in error was prevented from having a fair trial.

II.

Misconduct of the jury, whereby plaintiff in error was prevented from having a fair trial.

III.

The verdict of the jury is not sustained by sufficient evidence.

IV.

Errors of law occurring at the trial and duly excepted to by plaintiff in error.

V.

Said court erred in denying plaintiff in error leave to file an amendment to its answer, setting up the adjudication of the defendant in error as a bankrupt.

VI.

Said court erred in refusing to substitute the trustee in bankruptcy of said defendant in error as party plaintiff in said cause.

VII.

Said court erred in permitting defendant in error to maintain this action in his own name.

33 VIII.

Said court erred in refusing to sustain the motion of plaintiff in error for judgment on the pleadings.

IX.

Said court erred in refusing to require the defendant in error to elect whether he would proceed in this cause under the Act of Congress of April 22, 1908, as amended, known as the Employers' Liability Act, or under the Constitution and laws of the state of Oklahoma.

X.

Said court erred in admitting incompetent, irrelevant and immaterial testimony on behalf of defendant in error, over the objection of plaintiff in error.

XI.

Said court erred in overruling the demurrer of plaintiff in error to the evidence of defendant in error.

XII.

Said court erred in excluding and refusing to admit competent, relevant and material testimony offered by plaintiff in error.

XIII.

Said court erred in refusing to instruct the jury to return a verdict in favor of plaintiff in error.

XIV.

Said court erred in permitting defendant in error to re-open his case after both parties had finally rested and the witnesses had been excused.

34

XV.

Said court erred in his instructions to the jury and especially in giving to the jury instructions Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 inclusive; and in giving each of said instructions.

XVI.

Said court erred in refusing to give to the jury the several instructions requested by plaintiff in error, and in refusing to give each of said instructions, as requested.

XVII.

Said court erred in receiving a verdict signed or agreed to by less than twelve jurors.

XVIII.

The verdict of the jury is excessive, appearing to have been given under the influence of passion or prejudice.

XIX.

Said court erred in permitting counsel for defendant in error to make improper and prejudicial argument and statements to the jury, and in not withdrawing said statements and admonishing counsel with reference thereto.

XX.

Said jury erred in improperly arriving at its verdict, the same being arrived at by lot.

XXI.

35 Said court erred in denying plaintiff in error's petition for a removal of said cause to the Federal Court for the Eastern District of Oklahoma.

XXII.

Said court erred in overruling plaintiff in error's motion for a new trial.

Wherefore, plaintiff in error prays that said judgment so rendered be reversed, set aside, and held for naught, and that plaintiff in error be restored to all rights that it has lost by the rendition of such judgment; and for such other relief as to the court may seem just and proper.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

36 (Filed June 11, 1913. W. H. L. Campbell, Clerk.)

In the District Court of Carter County, State of Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
versus
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Case-made.

Appearances:

For the Plaintiff, Stuart, Cruce & Gilbert, Cruce & Potter, L. S. Dolman.
For the Defendant, R. A. Klienschmidt, J. H. Grant, Harreld, Ward & Hutchison.

Filed Mar. 26, 1913. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

Exhibit "A."

37-41 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Case-made.

Appearances:
For the Plaintiff, Stuart, Cruce & Gilbert, Cruce & Potter, L. S. Dolman.
For the Defendant, R. A. Kleinschmidt, J. H. Grant, Harreld, Ward & Hutchison.

Filed Mar. 26, 1913. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

Exhibit "A."

42 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Case-made.

Be it remembered, That on the 13th day of April, 1912, the plaintiff, Harry A. Brown, commenced this action against the defendant, the St. Louis & San Francisco Railroad Company, by filing in the District Court of Carter County, Oklahoma, his petition in writing, which petition appears in the words and figures following, to-wit:

43 In the District Court Within and for the 8th Judicial District, Sitting at Ardmore, Carter County.

Number —.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Defendant.

Petition.

Comes now the plaintiff herein, and for his cause of action against the defendant complains and alleges:

I.

That the plaintiff, Harry A. Brown, is a resident and citizen of Aylesworth, Marshall County, Oklahoma.

II.

That the defendant is and was at the times hereinafter mentioned, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and was at all times hereinafter mentioned engaged in the operation of a line of railway between the town of Hugo in the State of Oklahoma, and in and through the town of Ashdown to the town of Hope, in the state of Arkansas, and is and was at all times hereinafter mentioned a Common Carrier engaged in commerce between said town of Hugo and said Town of Hope, and was and is now operating a line of railway through Carter County, Oklahoma and has an agent
44 in said County and State upon whom service of summons can be had.

III.

That at all the times hereinafter mentioned the plaintiff, Harry A. Brown, was in the employment of said defendant as an extra brakeman, and was at all times hereinafter mentioned engaged as an extra brakeman running out of the town of Ashdown, Arkansas.

IV.

That on the 20th day of February, 1911, while engaged in cutting out and taking on cars in making up a regular train, destined for Hugo, Oklahoma, and while at the town of Ashdown, Arkansas, plaintiff was permanently injured, as will hereinafter appear, through carelessness and negligence of the said Tom Chamberlain, engineer engaged in making up said train.

That there was a passing track at said point leaving the main line and re-connecting with said line at a point at a distance sufficient to accommodate all trains in service upon said line. That said passing track had a switch connecting the same with a spur track running out to accommodate a mill some distance from said track. That neither said passing track or said mill track were ballasted and the ties stood up four or six inches from the ground, all of which was well known by said engineer and said defendant.

That said train had pulled in from said main line upon said passing track, and the engine and a few cars had been cut off from said train in order to pick up several cars standing on said
45 mill track, and said plaintiff was ordered and it was his duty to assist in picking up said cars on said mill track and said cars had been pulled out on said passing track.

That said plaintiff, as was his duty, and while acting within the scope of his employment, and as he was ordered, had signaled said engineer to stop and wait until plaintiff could throw the switch and arrange the knuckles on the end car so that it would couple on to the main train standing as aforesaid on the passing track.

That said engineer had stopped the train, and plaintiff had thrown the switch and stepped in between the rails and between the ties to fix the knuckle on the coupler as it was his duty to do, when said engineer, disobeying plaintiff's signal to wait, without warning or notice to plaintiff, suddenly and with great force, careless and negligently put said engine and cars in rapid motion and backed said cars upon plaintiff so suddenly and unexpectedly as to make it impossible for plaintiff to escape, and plaintiff was violently thrown across said rail and both of his feet crushed and maimed so that plaintiff sustained permanent injuries as follows:

Said plaintiff's right foot was crushed in the instep and toes and the bones broken therein so that the same protruded through the flesh causing said foot to become permanently drawn out of shape; that said muscles and tendons of said foot were permanently injured, bruised and strained so that plaintiff can never have full and free use of same.

That said left foot and ankle were crushed and maimed
46 so that a large portion of the bones of the ankle and foot were splintered and mashed so that it became necessary to

remove the same, thereby, totally disabling said foot and requiring plaintiff to use crutches in order to walk. That by reason of said injuries plaintiff suffered great physical and mental paid and anguish, and has been, ever since said injury, and is now, under the constant care of physicians and surgeons.

V.

Plaintiff further alleges that it became and was his duty to so arrange the knuckles upon the drawbars at the ends of the cars, that the same would couple by impact, and that while the cars on the mill track were being pulled out upon the passing track, he crossed over to the end car of the train left standing upon the passing track to open the knuckle thereon, but that the same was so defective that plaintiff was unable to open the same. Plaintiff then signaled the engineer as aforesaid to stop and wait while he opened the knuckle upon the rear car attached to said engine, and that said knuckle was so defective that it stuck and refused to open, and it was while so engaged that plaintiff was injured, as hereinbefore alleged, while he was in the exercise of due care and without fault or negligence on his part. That both of said cars were used by said defendant in interstate commerce and had couplers so defective that they would not couple automatically by impact, as required by the Act of Congress of March 2, 1893 (27 Stat. L. 531) as extended and amended by the Act of Congress of April 22, 1908, (35 Stat. L. 657) and that it was necessary for plaintiff in the perform-
47 ance of his duties as head brakeman to remedy the defects and go in between the ends of the cars and fix the same so that they would couple by impact.

VI.

That prior to said injuries plaintiff was a strong abled bodied man, competent to perform any of the services required of a railway brakeman, and had an earning capacity of $5.00 per day. That by reason of said injuries plaintiff is totally and permanently incapacitated to perform any of the duties of a brakeman, and his *dis*ability to labor at any occupation has been seriously impaired.

Plaintiff says that by reason of the foregoing negligence of defendant and its agents, he has sustained damages in the sum of $35,000.00, for which he sues herein, and he prays that upon final hearing he have judgment against defendant for $35,000.00, and he prays for costs and general relief.

STUART, CRUCE & GILBERT AND
S. A. BROWN &
L. S. DOLMAN,
Attorneys for Plaintiff.

Attorneys' lien Claim.

On the back of said petition appears the following endorsement: Filed Apr. 13, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

48-73 And afterwards, to-wit, on the 13th day of April, 1912, the plaintiff filed in said court his præcipe for summons, which præcipe appears in the words and figures following, to wit:

* * * * * * *

74 And afterwards, to-wit, on the 30th day of September, 1912, the defendant filed in said court its answer, which answer appears in the words and figures following, to-wit:

75 In the District Court.

STATE OF OKLAHOMA,
Carter County, ss:

H. A. BROWN, by S. A. BROWN, His Next Friend, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Comes now said defendant by leave of court first had and obtained and files this its answer to the petition of plaintiff herein, and answering says:

I.

It denies each and every allegation therein contained except such as are hereinafter specifically admitted.

II.

Defendant admits that it is, and was at the time set forth in plaintiff's petition, a railroad corporation duly organized and existing under and by virtue of the laws of the State of Missouri.

III.

Further answering and for further defense, defendant specifically denies that the said plaintiff, Harry A. Brown, was at the time of the accident in question, on the 20th day of February, 1911, engaged
76 as a brakeman on a freight train which made daily trips between Hugo, Oklahoma, and Hope, Arkansas; and defendant specifically denies that the said plaintiff was at said time engaged in the handling of interstate commerce, or that the train in question was engaged in interstate commerce, and defendant alleges the fact to be that the said train was a local train operating wholly within the state of Arkansas between Hope and Ashdown in said state.

IV.

Further answering and for further defense, defendant specifically denies that either or both of the cars described in paragraph 5 of plaintiff's petition was defective, or that the same were equipped

with couplers so defective that they would not couple automatically by impact as required by the Act of Congress of March 2, 1893, as amended by Act of April 22, 1908; and said defendant specifically denies that the said cars, or either of them, were not equipped with couplers and appliances in strict compliance with said Acts of Congress.

V.

Further answering and for further defense, defendant specifically denies that it was, or became the duty — the said plaintiff, or was necessary for him in the performance of his duties, to go in between the ends of the said cars in order to fix the same, or to make a coupling, and alleges that said cars and each of them, were properly equipped with operating levers by which the knuckles and couplers on the said cars, and each of them, could be prepared for coupling by impact by plaintiff while standing outside of the track, and without going between the said cars.

77

VI.

Further answering and for a further defense, defendant denies that the injuries, if any, sustained by the plaintiff were caused in any manner by the negligence of this defendant, and alleges that if his said injuries were caused or contributed to by any act of negligence save his own, it was the negligence of a fellow servant or fellow servants of the said plaintiff, for which the defendant would not be liable.

VII.

Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the said plaintiff, were due to and directly contributed to by his own negligence in the premises, in this to-wit: That the said plaintiff, while engaged as brakeman in assisting in the switching of cars at Ashdown, Arkansas, gave the engineer of the train in question a signal to back-up, in obedience to which the said engineer caused the engine and cars connected therewith to back, and the said plaintiff carelessly and negligently, in disregard of his own safety and the rules of the Company, went between two of said cars while they were moving, or in front of one of the cars while so moving, and in some way unknown to this defendant, slipped and fell upon the rails and was run over; that it was not necessary for the plaintiff to go between or in front of the moving cars, and that his act in doing so was in plain disregard of his own safety, and was the direct cause of his injury.

VIII.

78 Further answering and for a further defense, defendant alleges that at the time plaintiff secured employment with the defendant, as a part of the consideration of his employment by said company, he entered into a contract and agreement, signed by him, which has at all times since been in full force and

effect, and a copy thereof is hereto attached, marked Exhibit "A," and made a part hereof.

That in paragraph 12 of said contract it is provided as follows:

"In further consideration of such employment, I agree that if, while in the service of said company, I sustain any personal injury for which I shall or may make claim against the Company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a Superintendent, Claims Attorney, or Claim Agent of said Company, which notice shall state the time, place, manner and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid, shall be a bar to the institution of any suit on account of such injuries."

Defendant alleges that the said plaintiff has wholly failed, neglected and refused to comply with such provision of said contract, and has not given any notice in writing of his claim for the alleged injuries to the superintendent, claims attorney, or claim agent of the defendant, stating the time, place, manner and cause of his injuries, and the nature thereof and the claim made therefor; and defendant alleges that by the failure of the plaintiff to give such notice as is required by said contract, he should be barred from maintaining this suit, or recovering any damages thereunder.

79 IX.

Further answering and for a further defense, defendant alleges that at the time plaintiff secured employment with the defendant, he entered into a written contract, duly executed by him, as part consideration of securing such employment, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That in paragraph 12 of said contract, it is stipulated and agreed as follows:

"I hereby certify that the foregoing statements are true, and hereby apply for a situation in the service of the St. Louis & San Francisco Railroad Company; and if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the General and Special Rules and Regulations of the department of service in which I may be employed, and faithfully observe the same, and keep advised of such amendments to said Rules and Regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntary or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said Company to make monthly deductions from my wages, in accordance with Circular No. 35 of June 29, 1899, and pay the same to the Employés' Hospital Association of the Frisco System; and if I am accepted as an employé, I authorize the deduction of one dollar to cover medical ex-

amination fee. I understand that standing in front of or getting onto an engine or car coming towards me is dangerous and is in violation of the rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car; and that it is dangerous to climb up and down the sides of cars while passing water tank spouts, sand-house pipes, coal houses, seed houses, cotton platforms, or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion is dangerous, and is forbidden by the Rules of the Company, and I
80 agree to refrain from so doing.

I understand that the duties of a brakeman expose me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others."

In addition thereto, plaintiff signed an additional paragraph on the last page of said agreement, recognizing that he was prohibited from going between cars.

That the plaintiff thereby agreed and undertook to assume the hazards and risks of his employment; that the occupation of brakeman on a freight train is necessarily a dangerous and hazardous one; that the plaintiff well knowing this fact, as aforesaid, applied for and secured employment with the defendant as such brakeman, and elected to remain in the employ of the defendant, with full knowledge of all the risks, hazards and dangers incident to his employment, and he thereby assumed such risks, dangers, and hazards; and defendant alleges that if the plaintiff was injured as alleged, such injuries were the direct result of a risk of his employment assumed by him, by reason of which he is not entitled to recover herein.

That among the rules promulgated by the defendant company, and in force on its lines, necessary for the safety of employés, were the following, which were well known to the plaintiff when he accepted employment of the defendant, and which, as aforesaid, he undertook and agreed to obey:

General Notice.

To enter or remain in the service is an assurance of willingness to obey the rules.

Obedience to the rules is essential to the safety of pas-
81 sengers and employés, and to the protection of property.

Employés, in accepting employment, assume its risks.

Rule No. 630. All persons entering into or remaining in the service of this Company, are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may re-

sult to them by reason of any act, negligent or otherwise, done by any person employed by the Company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

Rule No. 631. Each employé is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellow. Employés of every rank and grade are warned to see for themselves before using them, that the rolling stock, machinery or tools which they are required to use, are in safe condition, or that they are so put before using them.

Rule No. 632. The company does not require or expect its employés to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.

Rule No. 634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it danger- to expose the hands, arms or person of those engaged in coupling cars, all employés will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

Rule No. 636. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen, will be obeyed when obedience to those signals on the part of the engineman or fireman is essentual to *to* safety of an employé in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position—otherwise, without such knowledge he assumes all risks of danger arising from any misunderstanding or disregard of signals.

82 Rule No. 637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed or go between cars in motion to uncouple them, or to follow other dangerous practices."

That the plaintiff thereby assumed the risks incident to his employment; that his injuries, if any, were sustained as an incident of such risks, by reason of which he is not entitled to recover herein.

Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the plaintiff, were directly due to his own negligence and want of care in this, among other things, to-wit; that he carelessly and negligently violated the provisions of his written contract of employment heretofore referred to, and also all or part of the following rules and regulations of the company, to-wit:

Rules Nos. 63*p*, 631, 632, 634, 636 and 637, which said rules have heretofore been set out in paragraph IX hereof; and defendant alleges that if the plaintiff had observed said rules, he would not have sustained any injuries; that he could have performed his duties as brakeman, with entire safety to himself; that it was not

necessary for him to go between cars, or to go in front of a moving car; nor was it necessary for him to operate, or attempt to operate, or adjust the couplers or knuckles on the car or cars in question, while he was between cars or one the track; that the plaintiff in doing these acts, or either of them, was acting in direct violation and disregard to the rules and regulations od the defendant,
83 which had been established for his own safety, as well as said agreement; and that if he was injured while so doing, he was guilty of contributory negligence, directly causing such injuries, by reason of which he is not entitled to recover herein.

Wherefore, having fully answered, defendant asks to be hence discharged with its costs.

R. A. KLIENSCHMIDT,
FRED E. SUITS,
HARRELD, WARD & HUTCHISON,
Attorneys for Defendant.

84 Attached to said answer and marked Exhibit "A" appears the following:

Received
Apr. 13, 1910.
Trainmasters' Office,
Hugo, I. T.

Frisco.

Application for Employment.

Instructions.

All applications for employment as agents, operators, station baggagemen, engineers, firemen, engine hostlers, conductors, brakeman, train baggagemen, yardmasters, assistant yardmasters, switch foremen, switchmen, switch tenders, signal men, tower men, yard flagmen, bridge tenders, flagmen, gatemen, section foremen, railroad crossing flagmen, bridge foremen, watchmen and such other employes as may be designated by the General Superintendent or General Superintendent of Motive Power, must be made by the applicant himself, in duplicate, on this blank. The applicant will then report to the Company's Surgeon to have his sight and hearing tested, and when position applied for is in the engine, train or switching service, for a physical examination also. Surgeons making such tests and examinations will report result of same in proper place on this blank, sending one report to the Divisions Superintendent or General Superintendent of Motive Power, and the other to the Chief Surgeon. A fee of one dollar will be charged
85 for making such examinations.

All persons engaging in the service of this Company in a capacity in any way connected with the Transportation Department are hereby instructed and notified that they must not enter upon

their duties until they have first read and fully understand all the General Rules and Regulations in the Book of Rules and Regulations, Operating Department, and the Special Rules attached to the Current Time Table.

March 4th, 1910.

To Mr. F. D. Hohnsbeen, Ass't Supt., Hugo, Okla.

1. My full name is Harry Augusta Brown.

2. When born Dec. 9th, 1887. Where born Ardmore, Okla. weight 180# Height 5 ft. 11 in. Complexion dark. Color Hair brown. Color Eyes gray.

3. Name of wife, if living (if unmarried, so state) Roberta M. Brown. Residence, Aylesworth, Oklahoma.

4. Name of father and mother, if living S. A. Brown, M. C. Brown, Residence, Aylesworth, Oklahoma.

5. If unmarried and parents not living, name and address of nearest relative——

6. Names and addressed of any persons dependent upon you for support, or to whose support you are contributing Roberta M. Brown, my wife.

7. Occupation previous to engaging in railway service Bookkeeper.

8. Cause of leaving last situation (explain fully) Wish to take up outdoor work.

(If you have ever been in the service of this Company
86 state what length of time, in what capacity, where, when and why you left it) Never in their service.

9. State what railroad experience you have had, giving names of roads, in what capacity employed, length of service on each road. If you have not previously been employed by a railroad company, state by whom and when and where-n you were employed. (Applicant must here give his history for last five years, beginning with his position of five years ago, and giving each year in regular order down to date.)

Name of railroad or other employer.	Town or city at which employed.	Name of State.	Name and present address of employer.
Wessly Peacock	San Antonio	Texas	San Antonio, Tex.
Capt. Literia	Sherman	"	Sherman "
G. R. Smith,	Gainesville	"	Gainesville "
S. A. Brown	Aylesworth,	Okla.	Aylesworth, Okla.

What was your occupation.	Date you entered their service.	Date you left their service.
In school,	Oct. 7, 1904	May 12, 1906
" "	May 12, 1906	June 1, 1907
" "	June 5, 1907	Dec. 20, 1907
Bookkeeper.	Jan. 2. 1909	Feb. 10. 1910.

10. Have you ever been discharged or suspended from any situation? If so, state particulars, when and where? No.

11. Have you ever been injured? If so, when, where, how and extent of injury? No.

12. Have you now, or did you ever have any litigation with any railroad company? No.

87 In consideration of my employment by said Company, I further agree that whenever I shall sustain any personal injury while in the service of said Company, either upon lines of road operated by it, or by any company with which it shall have train, track or running arrangements, or while in the service of any company, with which it shall be united in a so-called railway system, I will allow the surgeons of the Company in whose service I may so be, and any medical examiners selected by it, to examine my person and body as often as the Company may deem necessary; and, in the event of any suit or action against any of such companies for injuries received, or for death resulting therefrom, I hereby agree, in consideration of my said employment, that any surgeon, physician or medical examiner, who may have attended or examined me while in the employ of any of the aforesaid companies, or at any time prior or subsequent thereto, may testify as to all facts in his knowledge, whether derived from the confidential relation of physician and patient or not, and I hereby waive all objections to any such surgeon, physician or medical examiner so testifying whenever called upon by any of the aforesaid companies, and further agree that refusal to allow any such examination to be made, or such testimony to be given, shall be a bar to the institution or prosecution of any action on account of such injuries, and any such action, pending at the time of such refusal shall at once abate in consequence thereof.

88 In further consideration of such employment, I agree that if, while in the service of said Company, I sustain any personal injury for which I shall or may make claim against the Company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a Superintendent, Claims Attorney or Claim Agent of said Company, which notice shall state the time, place, manner and cause of my being injured and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.

If, however, the laws of the state or territory within which such injury may be sustained shall require the giving of notice of injury, then such notice shall comply with such requirements. If the laws of the state or territory within which such injury may be sustained provide that a contract or agreement for the giving of such notice, within less than a stated period, shall be void, then the applicant agrees to give notice of injury within the minimum period designated by such act or acts, and as provided herein; if no provision be made therein, then such notice to be given as proved herein.

In further consideration of such employment, I hereby authorize this company and its officers and the officers of any other company or firm by which I have been heretofore employed, to answer any or all inquiries as to my conduct and qualifications while in such

service, and, so far as they may know, the cause of my leaving the same.

I further agree that if under my employment I shall be
89 called upon to work or run on the lines of any company with which the employing company shall have train, traffic or running arrangements, or if I shall be called upon to work or run on any line of road with which it shall be united in a so-called railway system, all the conditions, obligations and provisions of this instrument shall be held to be for the benefit of, and to have the same force and effect as if made directly with such other company, line or road; and in case of injury on such other line or road or part of such system, I agree to give the notice hereinbefore provided for to a Superintendent thereof, and also to the Claims Attorney or Claim Agent of the employing company, or as may otherwise be provided by law.

In consideration of such employment, I further agree that the aforesaid provisions respecting medical examinations, the waiver as to giving of testimony by surgeons, physicians or medical examiners, and the giving of notice of personal injuries shall be binding upon my assigns, heirs, administrators and executors, as well as upon myself.

I hereby certify that the foregoing statements are true and apply for a situation in the service of the St. Louis and San Francisco Railroad Company; and if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the General and Special Rules and Regulations of the department of service in which I may be employed, and faithfully observe the same,
90 and to keep advised of such amendments to said Rules and Regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntary or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said Company to make monthly deductions from my wages in accordance with Circular No. 35 of June 29, 1899, and pay the same to the Employes' Hospital Association of the Frisco System; and if I am accepted as an employe, I authorize the deduction from the first wages earned the sum of one dollar to cover medical examination fee. I understand*ing* that standing in front of or getting on to an engine or car coming towards me is dangerous and is in violation of the Rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car; and that it is dangerous to climb up and down the sides of cars while passing water-tank spouts, sand-house pipes, coal houses, seed houses, cotton platforms, or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion is

dangerous and is forbidden by the Rules of the Company, and I agree to refrain from so doing.

I understand that the duties of a brakeman exposes me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others.

91 Should I enter the service pending the approval of my application, and said application be not approved, I agree to be removed at once and without complaint.

I have carefully read the foregoing and that portion of the time table of the Red River Division of the St. Louis and San Francisco Railroad Company which specifies the bridges and overhead structures which will not clear a man standing on top of a car, and agree on my first trip over the road to particularly familiarize myself with their location and take no risks.

(S.) H. A. BROWN, *Applicant.*

My present address if Aylesworth, Okla.

F. D. HOHNSBEEN, *Ass't Supt.*

Witness:
(S.) J. W. WOMBLE.

Applicant approved for employment as —.

—— ——.

NOTE.—This application must be filled out by applicant in presence of and witnessed by the head of the Deppartment (or his deputy) in which the applicant is to be employed. Copy must be sent to Chief Surgeon.

Surgeon's Certificate of Examination.

This examination must not be made except by especially designated Examining Surgeon.

of H. A. Brown.
Occupation brakeman. Age 22 yrs.

92

Vision.	Color sense.	Hearing.
Right eye 20	Give number of skeins selected to match test skein "A"	
Give last five letters read at 20 feet AR-DZ	3-5-7-9-11-13-15-17-19	
Left eye	Give numbers of skeins selected to match test skein "B".	Right Ear, watch 36 whisper 20.
Give last five letters read at 20 feet.....	21-23-25-27-29.	

Combined	Give numbers of skeins selected to match test skein "C". 31-33-35-37-39.	Left ear, watch 36 whisper 20.

For red Normal.

For Green Normal.

What is rate of pulse? 74 of Respiration? 18.
What disease has he suffered from? Nothing.
Has he ever suffered from hernia? No.
Has he ever suffered from injury? No.
Is he the subject of any deformity, from injury or otherwise? No.

Has he any present source of disability in

(Applicants should be st-ipped for this examination. Note with care varicose veins, enlarged joints and anything tending to produce or prolong disability.)

Heart. No.
Lungs. No.
Kidneys. No.
Joints. No.
Veins. No.
Feet and legs. No.
Hands and arms. No.
Spine. No.
Urinary organs.

Does he use intoxicating liquors? No. Is his appearance that of a temperate man? Yes.

Has he had small-pox? No. or been recently vaccinated? Yes. his height is 5 feet 10½ inches; weight 180 pounds; color of 93 eyes gray of hair brown. He is physically average. I recommend him for position as brakeman.

(Signature) H. H. WHITE,
Per W. M. JOHN, *Surgeon.*

Examined at Hugo.
(Signature) (S.) H. A. BROWN, *Applicant.*
Date April 10, 1910.

I have carefully read that portion of the time table of the Red River division of the St. Louis & San Francisco Railroad which specifies the bridges and overhead structures which will not clear a man standing on top of a car, and agree on my first trip over the road to particularly familarize myself with their location and take no risks.

(S.) H. A. BROWN.

J. W. WOMBLE, *Witness.*

I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion

is dangerous, and is forbidden by the rules of the Company, and I am to refrain from so doing.

(S.) H. A. BROWN.

Witness:
J. W. WOMBLE.

On the back of said answer and attached exhibit appears the following endorsement:
Filed Sep. 30, 1912. S. F. Haynie, Clerk District Court, Carter, County, Oklahoma.

94 And afterwards, to-wit, on the 12th day of October, 1912, the plaintiff filed in said court his reply to the answer of the defendant, which reply appears in the words and figures following, to-wit:

95 In the District Court within and for Carter County, Oklahoma.

H. A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Reply.

Comes now the *defendant* herein, and for his reply to defendant's answer filed herein denies each and every, all and singular the allegations set out therein, save and except such allegations as admit of the truth of the allegations set out in plaintiff's petition, and save and except such allegations as are hereinafter specifically admitted.

I.

Plaintiff admits that he signed an instrument denominated "application for employment," referred to as exhibit "A," in paragraphs eight and nine of defendant's answer. That said application consists of questions to be answered by all applicants for employment in large type as to age, relationship, previous service and experience, and that there is printed therein at the end of the same in small and unconspicuous type the clause set out in said paragraphs eight and nine of defendant's answer, with other provisions, the consideration of which is stated to be the "employment" of plaintiff,
96 and while said clause states that plaintiff has "carefully read" the same, plaintiff has no recollection that he either read the same or had his attention called to the same at the time he signed it, and alleges the truth to be that he was not employed by defendant until long afterward. Plaintiff says that said application was executed at Hugo, Oklahoma, and was for services upon the lines of defendant company, with which said defendant had traffic arrange-

ments, and the purposes and intent of said clause was to enable said defendant company to exempt itself from liability created by the Acts of Congress referred to in plaintiff's petition, and particularly the Act approved April 22nd, 1908, and is by the terms of said act void and of no effect. That said clause further violates sections 8 and 9 of said article 23 of the Constitution of the State of Oklahoma, and is therefore void. For a further reply to paragraph 8 and 9 of defendant's answer, plaintiff says that immediately upon being injured, as set out in plaintiff's petition, he was taken by the officers, agents and employees of said defendant company to the Company Hospital at St. Louis, Missouri, and there kept under the care and control of the surgeon and nurses of defendant Company from the time of said accident until May 1st, 1911, where he was visited at various times by the claim agent of said defendant Company, seeking a settlement from plaintiff of his claim against said defendant, and that during said time and as soon after the accident as said defendant's surgeons and nurses would
97–106 permit, said defendant's claim agent procured oral and written statements from plaintiff of the time, place, manner and cause of the injury, and the nature and extent of such injuries, so far as defendant's surgeons had explained them to plaintiff. That said defendant's surgeons and nurses permitted said defendant's claim agent access to this plaintiff immediately after he came out from under the influence of anesthetics, and while he was suffering intense physical and mental pain from the effects of said injuries, and the operation required thereby. That said claim agent continued to importune plaintiff for a settlement of his claim for damages against said company up to the time he left said hospital on May 1st, 1911, and subsequent thereto many letters passed between plaintiff and plaintiff's attorney and said defendant in an effort to get said defendant to pay plaintiff his claim for damages against it, whereby said defendant has waived any specific compliance with the terms set out in said clause of said application.

STUART, CRUCE & GILBERT AND
L. S. DOLMAN,
Attorneys for Plaintiff.

On the back of said reply appears the following endorsement: Filed Oct. 12, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

* * * * * * *

107 And afterwards, to-wit, on the 9th day of December, 1912, the defendant requested the Court to require the plaintiff to elect on whether he would stand on the federal Employers' Liability Act, or the Statutes of the state of Oklahoma, which Motion was made orally, and appears in the words and figures following, to-wit:

By Mr. Klienschmidt: Comes now the defendant and requests the court to require the plaintiff to elect on whether he will stand on the federal Employers' Liability Act or the statutes of the state of Oklahoma.

By Mr. Cruce: If the testimony in this case shows, after we get

through—they have all their witnesses here—if the testimony shows they were not engaged in Interstate Commerce, then we will ask leave of the Court to amend our pleadings to conform to the proof.

108 And afterwards, to-wit, on the 10th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said court, this cause came on regularly for hearing before the Honorable Stillwell H. Russell, Judge of said Court, the plaintiff appearing in person and by A. C. Cruce, W. I. Cruce, W. D. Potter, L. S. Dolman and S. A. Brown, his attorneys, and the defendant appearing by R. A. Klienschmidt, J. H. Grant and J. W. Harreld, its attorneys, and both sides announcing ready for trial, and a jury being called for, a jury composed of twelve good and lawful citizens and residents of Carter County, Oklahoma, were duly selected, impaneled and sworn to try the issues in this cause, and thereupon the following evidence was offered and introduced, in the order following, to-wit:

Plaintiff's Evidence.

HARRY A. BROWN, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. Harry A. Brown.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. How old are you?
A. I was twenty-two years old yesterday.
109 Q. Where were you raised, Mr. Brown?
A. West of Ardmore here, about, I suppose, twelve miles.
Q. On the old Sam Brown farm?
A. Yes sir.
Q. Where are you living now?
A. Aylesworth, Oklahoma.
Q. Are you a married man?
A. Yes sir.
Q. What road is this that runs from Ardmore to Madill?
A. The Frisco.
Q. St. Louis & San Francisco Railway?
A. Yes sir.
Q. Does it run through Hugo?
A. Yes sir.
Q. And on to Ashdown, Arkansas?
A. Yes sir.
Q. And how far on east from there?
A. To Hope, Arkansas.
Q. What does it haul; passengers and freight?
A. Yes sir.

Q. From one state to another?
A. Yes sir.
Q. Were you ever in the employ of the defendant company?
A. Yes sir.
Q. When did you make application for that?
A. It was sometime in April, 1910.
Q. Did you undergo an examination? You made an application for what position?
A. Brakeman; I expected to work my way up.
110 Q. Did you expect to make railroading your life occupation?
A. Yes sir.
Q. Does the Company, or do you know, require examinations of parties desiring to enter its employ as brakemen?
A. Yes sir.
Q. Did you stand such examination?
A. Yes sir.
Q. Did you pass it?
A. Yes sir.
Q. Do you know what kind of an examination you passed, whether high or low?
A. I don't know; it seemed to be satisfactory; I was passed.
Q. You went to work for them about in July, you say?
A. Yes sir.
Q. Where did you work for them?
A. I worked for them out of Hugo.
Q. To what places?
A. To various places. Sometimes to Madill, sometimes to Ardmore, and sometimes into Arkansas, and sometimes into Sherman, Texas.
Q. As a brakeman?
A. Yes sir.
Q. Were you head brakeman when you first entered their employ?
A. I believe the first trip I ever made was as head brakeman.
Q. Did you keep the position as head brakeman?
A. I was changed about; I was braking extra.
Q. How long before that injury had you been the head brakeman?
A. All the time I had been on that line.
111 Q. How long was that?
A. Some four days.
Q. Well, what are the duties of the head brakeman, some of them?
A. Well, it is called what you call, following the engine; railroad men give it that term. You couple and uncouple the engine from cars, line switches, and giving and taking signals.
Q. Do you know what a switch sheet is?
A. Yes sir.
Q. What is that?
A. That is a list that has places—columns—for car numbers on it, and also the track numbers, and it has a list that is made out

by either the clerk or the way-master, or the agent at the station wherever it may be, for the certain locations of the cars, what cars are to be picked up and cars to be spotted.

Q. Where they go?

A. Yes sir.

Q. Did they have a way-master at this station, Ashdown?

A. No sir.

Q. Who made up the list there?

A. The agent made it up.

Q. Were you in the employ of the defendant company on the 20th of February, 1911?

A. Yes sir.

Q. Where were you on that day?

A. I came from Hope, Arkansas, to Ashdown, Arkansas.

Q. What time did you get to Ashdown?

112 A. It was between 10:30 and 10:45 in the morning.

Q. What kind of track there, and how many tracks has the defendant Company at that place?

A. They have a passing track.

Q. Have they a main track there, first?

A. Yes sir.

Q. Which direction does it run?

A. East and west, and passing track running east and west, and they have a connection with a road there, I forget the name of it; I am told it was formerly a log road, and also they have a mill, spur, that goes to the staving mill.

Q. You say there is another road there that is called a log road?

A. Yes sir, called that now.

Q. Which direction does it run?

A. Northeast.

Q. That has nothing to do with this suit?

A. No sir.

Q. Just leave that out. Can you make a diagram that will give us some idea about how the main track and the passing track and the spur track runs? Look at that map right carefully now, and see if that is substantially correct map of the location?

A. Yes sir, it is to the best I remember it, only I didn't know that this staving mill track here connected with the P. & G.

Q. This is the main line (indicating)?

A. Yes sir.

113 (The map referred to was here identified as plaintiff's Exhibit A.

Q. Now, do I understand you, there is a main line there, running east and west?

A. Yes sir.

Q. And just north of that is the passing track?

A. Yes sir.

Q. Now, north of the passing track is the line that runs by the stave mill, out northwest, and connects with the M., P. & G.?

A. It runs out by the staving mill; I didn't know it connected there.

Q. You knew it ran out by the staving mill?

A. Yes sir.

Q. That is what you call the spur?

A. Yes sir.

Q. Now, on this day in question, what day in February was it?

A. 20th day.

Q. What instructions, if any, did you receive about making up a train there?

A. Well, when we pulled in on the main line, the best I remember, it was on the main line, why, we all started to the depot. What I mean about that, it seems to me like the conductor and the swing brakeman and myself; there could have been others along.

Q. Who was your conductor?

A. Joe Pierce.

Q. Who was the other man that was along?

114 A. Dan Godbold.

Q. What do you call him? The swing brakeman?

A. Yes sir.

Q. What do you mean by that?

A. He is the man that works in the center and handles the switch list.

Q. The swit-h list you spoke of awhile ago?

A. Yes sir.

Q. Well, go ahead.

A. He beat me in the depot, and I stopped out at the entrance, and was talking to Mart Sanders, exchanged good morning with him.

Q. Who was he?

A. He was the conductor that was making up the train to go to Hugo.

Mr. Klienschmidt: If the Court please, I move to strike out the answer of the witness, that he was making up a train to go to Hugo, as not responsive to the question.

The Court: Sustained.

A. Godbold came out to me and says, bring the engine out on the mill train; he says, we have got to make up the Hugo train.

Mr. Klienschmidt: We move to strike that out as not responsive to the question, because he is asked what was done, and not what was said. It hasn't been shown that this man Godbold, who was a fellow brakeman, had any right to give him any instructions. We make the further objection that they cannot prove the character of this train by the statement of a brakeman; that is not the

115 best evidence, and that it is not material to the issues of this case, what the character of this train was, the material issue being, what was the character of the cars that he was handling at the time of the accident.

The Court: I will let the answer stand as it is.

To which action of the Court, the defendant then and there excepted.

Q. What was it you said he said?
A. He came out of the office, and he says to me, cut off the engine and bring it onto the mill; he says, we have got to make up the Hugo train so they can go out after the rest.
Q. What do you mean by the rest?
A. When they come in off the run, they have eight hours rest for every sixteen hours work.
Q. What hour in the day was this?
A. I don't know, but it seems to me it was up around 11 o'clock.
Q. Where is Hugo?
A. In Oklahoma.
Q. And you were then in Ashdown, Arkansas?
A. Yes sir.
Q. What did you do, in compliance with that statement?
A. We went through the necessary requirement to follow the instructions on the switch list and make up the train.
Q. This man, Godbold, he had the switch list. Now, what did you and he do? Who was the engineer in the engine?
A. Tom Chamberlain.
Q. Which direction was that engine pointing?
116 A. Headed west.
Q. Now, what did you and Chamberlain and Godbold do?
A. Godbold walked on over—there seems to be a cotton platform there—and he jumped through the cars and came to the mill track.
Q. That is the spur?
A. No, not the staving mill spur; that is the oil mill spur. I went across and——
Q. You were running the engine?
A. No sir, I was following it. The engineer was running it.
Q. You were giving the signals?
A. Yes sir. I brought the engine back in on this oil mill spur and we did quite a little bit of switching over there, over onto the passing track, taken on some cars and put out some. When we got through our switching there, we went down the passing track.
Q. Where was these cars that you took off the oil mill track?
A. I judge they were going to Hugo?

Mr. Kleinschmidt: We move to strike that out as not responsive to the question and purely guess work.
The Court: That part where he judges where they were going is stricken out.

Q. Godbold, you say, was giving directions from the switch list?
A. Yes sir.
Q. And his statements to you were that you were making
117 up a train that was going to Hugo?
A. Yes sir.
Mr. Klienschmidt: I object to that question.
The Court: Don't lead the witness.

Q. After you had switched these cars off of the oil mill track, what did you do?

A. Put them onto the passing track, back down to the staving mill switch.

Q. What is the staving mill switch? Is that the one you call the spur?

A. Yes sir, that is the switch you have on the map there.

Q. Now, you have the main track and the passing track and then the spur?

A. Yes sir.

Q. You came back on the spur then?

A. Yes sir.

Q. What did you do there?

A. We taken on cars.

Q. How many cars were on that spur?

A. When we went in there, I judge there was somewhere between four and seven; I don't know exactly.

Q. What did you do?

A. We went in there and got some of them, practically got them all, I think, pulled the entire switch clear, and brought them out to the passing track, put some in our train, taken some back and spotted them, and did various switching that had to be done.

Q. What do you mean by your train?

118 A. Well, sir, the train that we were making up for the Hugo crew.

Q. That was the train you were making up. You went out on the spur and got, first, all the cars off of the spur?

A. I wouldn't be positive; it seems to me it were.

Q. At least, you got a number of them?

A. Yes sir.

Q. Put them on the passing track?

A. Some of them; some back to the spur.

Q. Then go ahead and state what you did?

A. We finished our switching there.

Q. What was the last thing you did before leaving that spur, just before you were hurt?

A. When we got through our switching on the staving mill track——

Q. I thought you were going to call that the spur?

A. Well, on the spur. We backed back into the spur and spotted some cars.

Q. What do you mean by spotting a car?

A. If you wanted a car up to the cattle shed, or holding dock, you would put it to the particular place you wanted it, and you would call that spotting.

Q. Spotted a lot of cars on the spur?

A. Yes sir.

Q. Well, go ahead.

A. I got the car, however, the one that I got hurt from, or cut the other one off from it, and I don't know just how many there were left in on the spur, but I cut that car off and I gave the

119 engineer the go ahead signal.

Q. When you cut it off, that car was then attached to the cars that the engine was on?

A. Yes sir.
Q. Pointed west?
A. Yes sir.
Q. And you did what?
A. Gave the engineer the go ahead signal.
Q. What did he do?
A. He pulled up to the passing track. I put my foot up on the back end—he was going slow—and I stepped off and walked over on the map you have there to the passing track to this cut of cars on the passing track.
Q. Were there some cars on the passing track then?
A. Yes sir.
Q. What were those cars?
A. It was the train we were making up.
Q. Well, now, those cars were on the passing track?
A. Yes sir.
Q. Were they east or west, then, of the point where the spur connects with the passing track?
A. They were east.
Q. Now, go ahead.
A. I wal-ed over to the west end of this cut of cars that was on the passing track and tried this knuckle.
Q. What knuckle?
A. The west knuckle.
Q. The west end knuckle?
120 A. The west end knuckle that was on the cars on the passing track, that we were making up.
Q. What did you want to open the knuckle for?
A. It is necessary to open the knuckle, one of them at least, when you are going to make a connection between two cars.
Q. Is there a knuckle on each end of a car?
A. Yes sir.
Q. And if you want to put two cars together, one car that is fronting west, if you want to connect that to a car on the east of you, you either have to open a knuckle on the west of the east car or the east end of the west car?
A. Yes sir.
Q. You went there to open this knuckle on the west end of this car?
A. Yes sir.
Q. What did you do? Was there a lever there?
A. Yes sir.
Q. Would it work?
A. No sir. I tried the lever. It wouldn't work and I tried the knuckle with my hand, and it only gave a portion of the way out, and I adjusted it back then and closed it.
Q. Which side of that car was this upon? Was that left open on the north or south side?
A. The north side.
Q. Now, on this car that you first tried to open the knuckle on, the lifting lever was on the north side?

121 A. Yes sir.

Q. And you say you couldn't get that open?

A. No sir.

Q. Why couldn't you?

A. It was some defect in the couple some way.

Mr. Klienschmidt: That is objected to and asked to be stricken out as a conclusion of the witness.

The Court: Sustained.

Q. Would it work or not?

A. No sir.

Q. Did you try to work it?

A. Yes sir.

Q. Then what did you do?

A. I turned around, facing west on the north side of the passing track, and gave the engineer the stop signal.

Q. Where was he then?

A. He was in the cab?

Q. I mean where was that train, the east end of the train?

A. When I gave him the stop signal, the train was just pulling through the switch, the hind truck of the car was just about half way over the switch.

Q. You mean where the track connects with the passing track?

A. Yes sir, and it takes sometime to stop there, and by the time he stopped, he was somewhere between four and seven feet, to the best of my judgment, west of the spur switch.

Q. West of where the spur——

A. Intersects the passing track.

Q. Then what did you do?

122 A. I gave him the stop signal and I walked on up—it wasn't but about three steps, or something like that—and lined the switch.

Q. What do you mean by that?

A. Turned the switch in order to make a connection with the track.

Q. You turned the switch so when the cars came back it would go straight back and couple on the passing track?

A. Yes sir.

Q. Then what did you do?

A. I gave him a spot sign.

Q. What does that mean?

A. It means to stay there until you get a signal, the way I understand it, from the party that gives it.

Q. Where was the engineer at that time?

A. He was in the cab.

Q. Could you tell which way he was looking?

A. He was looking at me.

Q. How long after you gave him the sign to stop, how many seconds was it before you gave him the sign the stay there?

A. I couldn't put it into seconds, but I lined the switch and I

suppose it takes five or ten seconds to line a switch; may be not so long.

Q. Was the car still then?

A. He was stopped just about the time I got the switch lined.

123 Q. Then what did you do?

A. When I gave the spot sign and I saw that he saw me, I turned to the left——

Q. Which way was that?

A. South. Passed south to go across the track to get the lifting pin.

Q. What did you have to go across the track for?

A. To get the lifting pin.

Q. Where was it?

A. On the south side of the car.

Q. And you were on the north side?

A. Yes sir.

Mr. Grant: We object to these leading questions.

The Court: That is objectionable.

Q. Well, go ahead?

A. Well, I went across the track to get the lifting pin. I took hold of the lifting pin and it wouldn't work the knuckle; gave it a lift like that and it wouldn't work the knuckle. When I seen it wouldn't, I put my right hand on the knuckle that was in the draw bar in the east end of the car, to adjust it like that, to open it, and just as I got my hand on that knuckle, the lever had never given way, and just as I got my hand on that knuckle, I heard the motion of the cars, the engine taking the slack, and heard them coming back, and I stepped out to the left. I could have stepped out to the right, but in so doing I was partially on the south of the

124 track already, because I had my hand clean out to the side, on the lifting pin, and in so doing, I could turn a little less than half way round and be almost out on the left hand side. If I got out on the north side, I would have to cross two thirds of the track to step out on the north side, and as I put my hand on that knuckle, he came back, and the car hit me in the side, like that, and it knocked me in this position, and I started to step out, that knocked me down full of my back. The rail was right across there and I realized what was going to take place if there wasn't something did. I rolled, I couldn't tell just how far, but I rolled over and when I rolled over, it seemed like my foot was fastened in something and it caught my foot together like that, in the shape like this, and the car wheel caught me and ran over me.

Q. What was done then?

A. Well, sir, when the car wheel ran over me, the best I remember, I got out after the first wheel passed over me; I jerked them out, or I suppose I did. They were out, and I turned over on my hands and knees—I couldn't stand the misery, and the pain got so severe, I just turned over and laid down, and the next I knew, Dan Godbold—I couldn't tell how long I had been on the ground, but it

wasn't very long—Dan Godbold came between the cars, it
125 seemed to me he came between the west end of the cars that hit me; he jumped through the cars and it seemed like he was crying, or fixing to cry, and he said, my God, Harry, and that is the last time I saw him until he came back with more aid.

Q. What was done with you? What did they do with you then?

A. Well, the train crew came, and also some of the Hugo crew, Mart Sanders, Bill Smith and Harry Beard, the fireman on the engine that I was working with; I don't know how many. They picked me up and put me in the caboose—they brought the caboose around to me, and put me in this caboose and carried me up somewhere up there in town, I couldn't tell where the caboose was stationed, but it was somewhere near the depot, and Mart Sanders was asking for orders to leave the train out and bring me to Hugo.

Q. Did they take you to Hugo?

A. Yes sir.

Q. What time of the day was this injury?

A. Well, sir, I looked at my watch, and it was fourteen minutes to eleven o'clock when we were pulling out of this switch, when I was walking over to make up the car.

Q. What kind of a car was this you were run over by?

A. An empty stock car.

Q. That is, a car used in general use shipping stock you mean, from one point to another?

A. They handle lumber in them too.

Q. Harry, now, when this car that ran over you, that was on the west end of the cars that were attached to the engine, when
126 it stopped on the passing track and you gave him the signal to stay there, how far was that car from the car back east on the passing track, which you were going to couple onto?

A. Well, sir, it wasn't very far.

Q. About how far?

A. Well, I would judge somewhere in the neighborhood of thirty-six or forty feet; something like a car length. It was far enough—you can judge for yourself—it was just past the clearance, past where it would be clear for two cars to pass one another.

Q. You would say it was as far apart as the length of a car? That is your judgment?

A. Yes sir.

Q. Now, this injury occurred then somewhere about eleven o'clock. They brought you to Hugo. What time did you get to Hugo?

A. They told me it was about four o'clock. It wasn't four when we drove in there.

Q. What was done when you got there?

A. I was put in some kind of a vehicle.

Q. Were you operated on there?

A. Yes sir, carried up to Dr. Johns' office.

Q. What was done there?

A. I was put under the influence of ether immediately on arriving there, and the next thing I knew was when my father came that

night, about 11 o'clock he tells me, and I remember him
127 being there, something about it, and the next thing I remember was being put in the baggage car, and they were kinder in a hurry, for fear they wouldn't catch the train.

Q. Put in a baggage car and taken where?

A. St. Louis.

Q. What was your condition? Was there any suffering? Were you feeling easy?

A. Nobody don't know how I did suffer. I hurt mighty bad.

Q. What time did you get to St. Louis?

A. It seemed to me we got to Tioga Station in St. Louis the following evening, about seven o'clock.

Q. On your way to St. Louis, was there any particular suffering you went through?

A. Yes sir, I suffered mighty bad, and besides, I couldn't get my water to run off; it wouldn't work.

Q. Kidneys wasn't working?

A. No sir.

Q. How did you get the water from them?

A. I was put on the train that morning and some place in Missouri, I forget where, the water was drawn off.

Q. When did your kidneys act again?

A. In St. Louis.

Q. Did they act, or drawn off?

A. Drawn off.

Q. Did that make you suffer or were you easy?

A. It hurt mighty bad.

Q. When you got to St. Louis, where were you taken?
128 A. To the Frisco Hospital.

Q. What was done there? Just tell in your own way.

A. I was carried down in the receiving room, or dressing room, I guess you would call it, and my clothes were taken off and my feet were dressed. I was bathed and carried up to a room, a surgical ward.

Q. What was done?

A. Well, that night I didn't sleep hardly any at all, and I believe it was the next day, it seems to me like, about ten o'clock, I wouldn't be definite as to the time, but I was prepared for operation, taken into the operating room, went under ether again, was operated on, and the next thing I remember, sometime the following morning, about two o'clock, about waking up and vomiting.

Q. Do you know what the doctor,—surgeon,—did at either place?

A. No sir, only what I was told.

Q. By them?

A. Yes sir.

Q. What did they say, if anything, about removing bones?

A. Dr. Johns just held up his hand and said he had taken his hand full of bones out of my left foot.

Q. Did you see the bones?

A. No sir.

Q. How long were you in the hospital?

A. I got there on the night of the 21st of February and left there the night of the first day of May, I believe it was; either the first day of May or the last day of April, and I believe it was the first day of May.

129 Q. You were treated all right, were you, while you were there?

A. Yes sir.

Q. Who was your surgeon there?

A. The chief surgeon was Dr. Kale; that is the chief surgeon, and Dr. Woolsey was the house surgeon, the doctor in charge.

Q. Is Dr. Woolsey here now?

A. Yes sir.

Q. Now, Harry, what condition were you in when you got home, with reference to being able to walk?

A. I was scarcely able to walk at all; I was on crutches.

Q. How long did you have to use crutches?

A. Well, sir, I used crutches until about the middle of August, the best I remember.

Q. And since, you walk without crutches?

A. Yes sir.

Q. Do you have any assistance at all in walking?

A. Sometimes I can walk very well. Sometimes I walk without a cane, by limping. I force myself to do it, on account of Dr. Woolsey, the last thing he advised me to do, was to use this foot all I could.

Q. What condition have your feet been in when you were on or off of them, in reference to being free from pain?

A. When the weather is good, and I don't use them much, it is better, but they hurt me all the time when I walk.

Q. Have you ever been able, since then, to put your weight on your feet and walk without pain?

A. No sir, never have.

130 Q. What were you earning at this time?

A. I was making between three and five dollars a day; I have made a little better; of course it was extra occasions. I generally made about three and a half a day.

Q. What has been the shape of your kidneys since then?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and there is no contention made in the petition that there is anything the matter, except with his feet.

Mr. Cruce: I will withdraw the question now, until we see how the pleadings are.

Q. Have you had any trouble since you came home?

A. Yes sir.

Q. With your feet?

A. Yes sir.

Q. When was that?

A. It seems to me it was last August a year ago.

Q. What was that?

A. Well, sir, I had erysipelas in this foot here, and had fever from the effects of it; at least I was told so.
Q. Who was your doctor?
A. John A. Hailey, and I was mighty sick over it.
Q. Is Dr. Hailey here?
A. Yes sir.
Q. Was there anybody else there while you were sick this last time?
A. Yes sir.
Q. Any Doctors?
131 A. Yes sir.
Q. Whom?
A. Dr. Schular from Durant, a Frisco physicial, and Dr. Johns, from Hugo, a Frisco physician.
Q. They came to see you while you were sick with that suffering in your feet, or Erysipelas?
A. Yes sir.
Q. I wish you would take off your shoes and socks, so the jury can see your feet.
A. (Witness does as requested.)
Q. How is the railroad track there, with reference to being ballasted?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case.
Mr. Cruce: I will withdraw the question.

Q. I wish you would turn around. Have you washed your feet?
A. Yes sir.
Q. When?
A. Last night.
By the Jury: Which way did that car wheel run?
A. It hit me right there, went on down there and went on to there, and dropped off on this and went out to the end of it.

By Mr. Cruce:

Q. Is there any place about your foot there that has got any loose bones?
A. There is a bone right here that is either loose or gone. It puts a dent in my shoes there and hurts me all the time when I
132 walk there, it can be felt through.
By the Jury: How many bones were taken out of there?
A. The only way I know, the physician at Hugo says, I — taken my hand full of bones out of your foot.

By Mr. Cruce:

Q. Is there any of your foot in any way stiff?
A. This one is stiff. I have fairly good use of that one, the ankle there. There ain't any ankle in this one at all.
Q. What do you wear that white sock for?
A. To keep from getting that foot infected.
Q. Do that under the advice of a physician?
A. Yes sir.

Q. Well, now, are these the shoes you had on at that time?
A. Yes sir, they are.
Q. Is that the sock that was on your left foot that day?
A. Yes sir.

Mr. Cruce: We want to introduce this sock as exhibit B.
Mr. Klienschmidt: We object to that as immaterial.
The Court: Overruled.
To which action of the Court, the defendant then and there excepted.

Q. Did that sock have these cuts on the outside and inside before the injury?
A. No sir.

Mr. Cruce: Now we offer this sock.
The Court: Take your exception; let it go in.

Q. Are these the shoes you had on at that time?
133 A. Yes sir.
Q. Is that sock in the same condition that it was after it was cut off your foot after the injury?
A. Absolutely, yes sir.
Q. Are these shoes in the same condition they were when they were taken off your feet?
A. Yes sir.
Q. Did these shoes have the breaks and cuts that you see in them now before the injury?
A. No sir.
Q. And you had the shoes on at the time?
A. Yes sir.
Q. The left shoe was on the one that the sock was on?
A. Yes sir.
Q. Is this the show, exhibit D, that was on the right foot?
A. Yes sir.
Q. What is that dent on the sole there?
A. I suppose that is where the flange of the wheel hit it.

Mr. Klienschmidt: I object to any supposition.
Mr. Cruce: I will withdraw that answer.

Q. Was that shoe in the condition it is now before the accident?
A. No sir.
Q. Did it have these dents on the sole and heel?
A. No sir.

Mr. Cruce: Now, we ask to introduce these shoes as exhibits C and D.
Mr. Klienschmidt: We make the same objection as heretofore.
134 The Court: Take your exception.

Q. Are you able to do any kind of work now that requires you to staid on your feet?
A. No sir, I can't stand on my feet for very long at a time.

Q. Have you ever been since this injury?
A. No sir.
Q. Do you notice any difference in the feeling of your feet now from what it was before the injury?
A. Yes sir.
Q. What is it?
A. When I rub my hand across this foot here, the right one feels kind of normal, only it feels like it was puffed up, had air in it.
Q. Where was that?
A. Right there under the seam.
Q. What do you mean by that, the ankle or what?
A. It is below the ankle some two inches below.
Q. How about your left foot?
A. When I rub my hand across this left one here, it don't have any feeling; feels like there was a glove or sack or something on it.
Q. When you have pain in your feet, where is the pain?
A. Simply all over it.
Q. Over what?
A. The foot.
Q. Do you ever suffer any pain in your right foot?
A. Yes sir.
Q. Where is that?
A. In the middle toe; there is a nub there that comes out.
135 Q. You showed the jury under the right foot a hard place, where you said there was a bone gone or loose or something?
A. That is the place.
Q. Were those pains moderate or severe, or how?
A. They are very severe; hurt me all the time when I walk.

Cross-examination by Mr. Klienschmidt:

Q. You have gained twenty-five or thirty pounds since the accident, haven't you?
A. More than that.
Q. How much?
A. I suppose about forty pounds.
Q. You are living at Aylesworth, in Marshall County?
A. Yes sir.
Q. And you were living there before you applied for employment with the railroad company?
A. Yes sir.
Q. Who did you apply to for employment?
A. Fred Hohnsbeen.
Q. He was assistant superintendent at Hugo?
A. Yes sir.
Q. Did you go to him, or write him a letter?
A. I wrote him a letter, at the suggestion of a mutual friend of ours.
Q. I understand you wanted to learn the railroad work?
A. Yes sir.
136 Q. You made voluntary application for the employment?
A. Well, sir, in a way.

Q. That is, nobody forced you to do it?
A. No sir.
Q. You had observed trains running and being operated through your town, Aylesworth, haven't you?
A. Yes sir.
Q. And had some knowledge of the way trains were run from seeing them?
A. Yes sir.
Q. And you had some idea of what the duties of a brakeman were?
A. Yes sir.
Q. Working around trains and coupling and uncoupling cars, etc.?
A. Yes sir.
Q. And you wanted to work along the same line, you wanted to work as a brakeman?
A. Yes sir; start at that, at least.
Q. After you wrote to Mr. Hohnsbeen at Hugo, he sent you a contract to sign, didn't he, an application for employment?
A. Yes sir.
Q. Look at this paper, which I will have identified as defendant's exhibit 1, and ask you to state if that is the application that was sent you and which you signed?
A. Yes sir.
Q. That is your signature on the second page, is it?
A. Yes sir.

Q. And on the last page your signature appears in three
137 places, I believe. Is that correct?
A. Yes sir.

Q. Now, you signed this at Aylesworth, didn't you?
A. Yes sir.
Q. Prior to the time that this application was sent you, your father had gone to Hugo to urge your appointment, your application, hadn't he?
A. No sir.
Q. Hadn't he been to see Mr. Hohnsbeen at all?
A. If he had, I don't know of it.
Q. There were negotiations back and forth for a while before you were employed?
A. Yes sir, there was negotiations between Hohnsbeen and our friend, as I said awhile ago.
Q. This application here was sent to Aylesworth and you signed it there?
A. Yes sir.
Q. And then it was forwarded back to Hugo?
A. Yes sir.
Q. You were put to work about March or April, 1910, weren't you, as a student brakeman?
A. Yes sir.
Q. About what month, March or April?
A. It seems to me like it was in April.

Q. And for about twenty or thirty days you worked, learning the business?

A. No sir, it wasn't that long.

138 Q. How long was it?

A. It was some seven days, something like that, all told, that I was there.

Q. It was over a longer period of time than that, but that is the time you worked?

A. No sir, I only worked three trips.

Q. Seven days all together?

A. I don't know; it was seven days, the entire time I was in Hugo.

Q. Then, after that, you were examined?

A. Yes sir.

Q. On your qualifications as a brakeman?

A. Yes sir.

Q. That included your knowledge of the rules of the company, in reference to a brakeman, did it not?

A. Yes sir.

Q. And you say you passed an examination?

A. Suppose I did, I was put to work.

Q. You say you were examined on the rules. Are those rules that are included in this little book, which I will have identified as defendant's exhibit C? Is that the book of rules you were examined on?

A. Yes sir.

Q. I will refer you to the rules, commencing at number 630 and running down to 637, inclusive, and ask you to state if you familiarized yourself with those rules, and passed an examination on them?

A. Yes sir.

Q. And when your examination was accepted and you

139 were put to work as an extra brakeman, you were given a copy of this book of rules?

A. Yes sir.

Q. You understood, did you not, Mr. Brown, that you were to be bound by the rules of the company, that they were your guide as to your conduct in and about trains?

A. Yes sir.

Q. And in entering the employ, you agreed to obey them?

A. Yes sir.

Q. On the last page of this application that you signed appears the following, over your signature: I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, is dangerous, and is forbidden by the rules of the Company, and I agree to refrain from so doing. You signed that, did you not?

A. Yes sir.

Q. And understood that?

A. Yes sir.

Q. And that was in accordance with the rules of the company. Now, you also understood, did you not, Mr. Brown, as is stated in the

rules, that the occupation of brakeman was a hazardous or dangerous one?

A. Yes sir.

Q. And you knew that when you went into the employ of the company?

A. Yes sir.

Q. How long had you been working as brakeman at the time you had this accident, Mr. Brown?

A. It was about eight months.

140 Q. Where did you go to work as an extra brakeman?

A. It was sometime in July.

Q. 1910?

A. Yes sir.

Q. Then you worked continuously as brakeman up until February 20, 1911?

A. Yes sir.

Q. Now, did that include——

A. Do you mean that I worked continuously, that included no lay-offs or anything like that?

A. I mean that was your business, with the exception of a few days that you would take off occassionally?

A. Yes sir.

Q. Now, during that time, you worked on the run between Hugo and Hope and Ashdown, did you not?

A. Yes sir.

Q. And became familiar with the different stations along and their tracks and sidings?

A. To Ashdown?

The Court: Hope is the extreme eastern terminal?

Mr. Klienschmidt: Yes sir.

Q. Now, both Hope and Ashdown are in Arkansas?

A. Yes sir.

Q. This accident happened at Ashdown, in Arkansas?

A. Yes sir.

Q. At that time, you were working as brakeman on a local freight train that ran from Hope to Ashdown, and then back to Hope, weren't you?

141 A. Sometimes plied over to Ark India and into Oklahoma.

Q. I am asking you at this time?

A. Yes sir.

Q. That is, the crew would start the train out of Hope in the morning, run to Ashdown, do the station switching and then double back to Hope the same day?

A. They would go to Hope the same day, yes sir. The day before that, though, we went to Ark India.

Q. I am asking you about on this day?

A. Up until that time, we had got to Ashdown.

Q. Ark India is in the state of Arkansas?

A. Yes sir.

Q. Now, on the morning in question, February 20, 1911, your

train had come in from Hope, that is, from the east, and therefore when it got into Ashdown, was headed west?

A. Yes sir.

Q. Where did your train head in? Did it head *it* on the passin-track when you came into Ashdown?

A. To the best of my memory, we pulled in on the main line; I wouldn't swear that we did, but it serves me that we did.

Q. Then what did you do?

A. We got out. I was riding the caboose. It seems like Godbold was up on the cars, possibly. We started to the depot. He went in the depot. Do you want me to tell that over?

Q. No, I want to know what you did with your train.

A. Our train, with the exception of the cars we cut off, was still standing where we left it.

142 Q. Where did you leave it, on the main line or the passing track?

A. I am not sure which; the best of my knowledge it was on the main line.

Q. Will you say it was not on the passing track that you left your train?

A. I tell you the best of my knowledge.

Q. But you are not sure?

A. No sir.

Q. You said, in answer to a question asked by Mr. Cruce a moment ago, that brakeman Godbold, who was working with you, said you were going to do the switching for the Hugo crew. Do I understand you to mean by that that while the Hugo Crew was laying out, you were going to do their station switching there and make up their train that was to make up there and go west?

A. They weren't required to do any station switching.

Q. You were going to make up the train for the Hugo crew?

A. Yes sir.

Q. But you don't undertake to say that you knew where any car in that train was going?

A. I don't know the destination.

Q. There were other stations in the state of Arkansas between Ashdown and Hugo, weren't there?

A. Yes sir, two or three.

Q. And you don't know where any car or piece of freight that you were switching that morning went to?

—. —.

143 Q. Now, referring to this plat that you identified on direct examination, plaintiff's exhibit A, you refer to this stave mill track as a spur. Now, as a matter of fact, isn't that known as the M. P. & G. Connection, as it is labeled on this plat?

A. I suppose it is, but you know I wasn't familiar with the tracks at Ashdown, because that was the third or fourth time, I believe, to Ashdown.

Q. You had been over there before?

A. Yes sir.

Q. You know where the M. P. & G. Line is, don't you?

A. Yes sir.

Q. Just to get the names correctly, this curving track that went by the stave mill, if it connected with the M. P. & G. track, it would be the N. P. & G. connection?

A. Yes sir.

Q. And in any event, it wouldn't be proper to call it a spur track, if it connects with another line?

A. No sir.

Q. Now, as I understand it, so the jury will understand it also, this north track—this is north here?

A. Yes sir.

Q. This is west?

A. Yes sir.

Q. This is east and this is south?

A. Yes sir.

Q. Now, the north track, running east and west there, was known as the passing track?

144 A. Yes sir.

Q. The south track, running east and west, is the main line of the defendant?

A. Yes sir.

Q. These tracks over here——

The Court: You mean by the passing track is where the cars go on the siding. It is a track to enable a train going one way to pass another going another way?

Mr. Klienschmidt: Yes sir.

Q. Now, these tracks at the extreme west of this plat are the Kansas City Southern and have nothing to do with this case?

A. Yes sir.

Q. The track running across the center is the main line?

A. Yes sir.

Q. Now, I believe you stated that just before this accident, the engine of your train had backed in on this M. P. & G. connection, or stave mill track, to leave some cars there, spot some cars there, you say?

A. Yes sir.

Q. About how far up this stave mill track did you leave those cars?

A. Right at the mill, the further end of the mill. Of course, you understand there were several cars, I don't know how many, but they extended up almost to the crossing.

Q. About how far was it from the mill down to the switch where the stave mill track connected with the passing track?

A. You mean the west end?

Q. From the mill here?

145 A. You understand, the mill track extends longways around from the mill.

Q. From the place where you cut the cars off?

A. It is something like, I suppose, a hundred feet, may be further, and may not be so far.

Q. That is your best judgment?

A. Yes sir.

Q. Now, after you had spotted these cars and disconnected the cars that the engine had hold of, and those were spotted, the train pulled on out of the stave mill track, towards the passing track, the engine with several cars attached. How many cars were attached to the engine at that time?

A. I couldn't say definitely; there were some four or five.

Q. The engine, with four or five cars, started on then, out of the mill connection, towards the passing track. Did you ride the rear car out part of the way?

A. Yes sir, a very short way. I caught hold of the back iron and put my feet up on the bar there. About that time, he put some more to his engine, and got a little better start, and my feet was about to slip off, and I just stepped off, and it was just a short ways to the west end of the cars.

Q. How fast was the engine of those cars going as it moved away from the stave mill, after you got off?

A. I couldn't tell you, but they were going much faster than a man could walk.

Q. As they first started up, they were going slowly, weren't they?

146 A. Well, I went back to get the slack and when he started, he went out pretty fast, considering what you would call fast, pulling out of a switch.

Q. Three or four miles an hour?

A. I couldn't estimate it; it was faster than you could walk.

Q. You knew the next work to be done with those cars was to couple them up with the string that was standing on the passing track, didn't you?

A. Yes sir.

Q. Couldn't you, with perfect safety, have followed that string as they pulled out of the M. P. & G. connection, behind them as they moved in front of you, and opened the knuckle?

A. I started to do that, but in one place there was mud there, and by the time they got past the mud there, they were going faster than a man could walk, and they were on the frog then.

Q. You mean the frog sits in here?

A. Yes sir.

Q. How far from the switch?

A. I don't know; the length of the point.

Q. How far was that? About fifteen feet?

A. I don't know; it seems like it was more.

Q. Twenty feet?

A. Possibly so.

Q. And so you followed the cars down in twenty feet of the switch?

A. No sir, of the frog.

147 Q. I thought you said you followed the cars down to the point, and the frog was the length of the frog from the switch?

A. The best I remember it, I said I followed it almost to the frog; there would be four tracks there, four rails.

Q. You followed it down near to the switch, anyway?
A. No sir, near to the frog.
Q. And then you say you cut across to the passing track, to where the cars were standing still on the passing track?
A. Yes sir.
Q. Now, there is a street crossing running north and south between this switch and the cars that were stationery, is there?
A. It seems to me like that the cars that were stationery, the front car, the back end of it, was sitting over the crossing; it seems to me that way, but I don't remember.
Q. Are you positive?
A. No sir, I am not.
Q. Did you notice how far the first car on the stationery string on the passing track was from this switch here, from the switch stand?
A. No sir.
Q. What is your best judgment?
A. Well, sir, it was—I can't describe it to you, but you can estimate it; it was right near the clearance stob.
Q. That is a short post?
A. Yes sir, to indicate when two cars will pass each other
148 in the clear.
Q. Was it east or west of that stob?
A. It was east of it, if anything, because if it was west, it wouldn't be in the clear.
Q. Now, do you remember the car number of the stationery car on the passing track?
A. No sir, I don't; I couldn't tell you either of the numbers.
Q. Do you know what the make of the coupler was it was equipped with?
A. I declare I couldn't tell you. It could have been a high-tower coupler.
Q. Known as the tower coupler?
A. Yes sir, but I wouldn't say that this was one of them, because I don't remember.
Q. You say you went up to it and tried to operate it?
A. Yes sir, but you understood me when I said what length of time I was there.
Q. You mean you just went on to it momentarily, and went right away again?
A. No sir, I went up to it and taken hold of the lever and it wouldn't operate, and then I taken hold of the knuckle and I could only get it half way open, not enough to perfect the couple, and then I adjusted the drawbar, and then turned around and, like I told you, it started.
Q. That had a continuous lever, clear across the end of it, didn't it?
A. It seems to me like it did; I wouldn't be positive as to that.
149 Q. Well, now, in describing these parts of the coupler, you spoke of the pin lever, or a pin lifter. Now, to get this

clearly before the Court and the jury, there is, first, what is known as a lever, running from the side of the car up to the coupler?

A. Yes sir.

Q. That is a handle on the outside of it, to be raised?

A. Yes sir.

Q. That is called the lever?

A. Yes sir.

Q. Now, the pin lift is that part of the mechanism running from the lever to the pin, and like which, goes down into the coupler?

A. Yes sir.

Q. That is to be worked by the lever, and when lifted out of there, there is the knuckle of the coupler open?

A. It does sometimes; that is the intention of it.

Q. Now, just to identify these things, I will call your attention to this diagram, which I will have identified as defendant's exhibit 3. Do you recognize that as the drawing of one of the what is known as the Letrope coupler?

A. I couldn't swear as to the make of it, because I wasn't familiar with all of them, but I recognized it as being a draw-bar and coupler.

Q. Is that the kind of a coupler that the car, the last car on the string with the engine that pulled out of the mill track, was equipped with?

A. I couldn't tell you whether it was or not; it seems like
150 it was.

Q. Now, this is a side view, this center view here, is a side view?

A. Yes sir.

Q. The top cut here is looking down from the top?

A. Yes sir.

Q. The whole is known as the coupler?

A. Yes sir.

Q. The part right here, which is moveable, is known as the knuckle?

A. Yes sir.

Q. The part shown here, on the top picture, or here on the center picture, is the pin or the lock which, when moved by the lever, pulls up and opens the knuckle?

A. Supposed to, yes sir.

Q. You say, now, Mr. Brown, that you left these moving cars, being pulled by the engine out of the mill track, near to the frog?

A. I couldn't say as to what distance; it was somewhere where the four tracks were.

Q. Was close to the frog, I believe you said?

A. Yes sir, somewhere near to that.

Q. You left them there and went over to the stationery car on the passing track?

A. Not straight across.

Q. How did you go?

A. More backwards than forwards; had to to get to the car.
151 Q. That is, you turned around and went east?

A. Turned around like that, and went that way (Indicating).

Q. And you say you tried to work the lever on that car?
A. Yes sir.
Q. And you didn't think it was open far enough?
A. No sir.
Q. So you turned then, and went back to the moving string of cars?
A. Yes sir. When I turned, though, I signaled the engineer to stop.
Q. You were still on the north side of the track when you gave the signal?
A. Yes sir.
Q. And you say the cars, during that time, had only moved as far as the switch?
A. Said they were going about over the switch, yes sir.
Q. Those cars hadn't moved very far, then, while you were trying to work the other car?
A. They were slowing up.
Q. You didn't stay very long at that stationery car, did you?
A. No sir.
Q. Just went there for a moment?
A. Long enough to find out what I wanted to know.
Q. Then you say you went over and gave the engineer a stop signal?
A. Yes sir.
Q. And he obeyed that signal?
A. He practically stopped; he was slowing down and had almost stopped when he received the signal.
152 Q. How far did he run with that last car west of the switch target?
A. Somewhere between four and seven feet west of there.
Q. That is, the end of the last car in that string, the engine being headed west here, was four to seven feet west of that switch target?
A. Yes sir.
Q. Now, do you know whereabouts you were hurt on the track?
A. I judge I was hurt somewhere near the point.
Q. Did you take any note of it at that time?
A. I wasn't in any shape to.
Q. So you don't know where it was except from hearsay?
A. That is all, except the conclusions I drew in my own mind. I know the conclusions I had.
Q. Now, you say that after giving the engineer this stop signal, you threw the switch from the passing track, which lined up the passing track, to the engineer to move thos- cars across on the passing track, and then you gave him a spot sign?
A. Yes sir.
Q. How do you make that?
A. Like that (Indicating).
Q. Was it necessary or usual to give him another sign after you had given him a stop signal?
A. It sometimes insures greater impression. He is liable to take some other fellow's signals than yours.

Q. He was following your signals that morning, wasn't he?
153 A. He was supposed to.
Q. The other brakemen weren't anywhere around?
A. I couldn't say where Godbold was. When I left him he was on top, I believe, of a car, setting a brake.
Q. That is, on the cars that were left out of the connection?
A. Yes sir.
Q. You didn't see him follow these cars that were taken out of the connection at all; he didn't follow these?
A. No sir.
Q. So you were the only brakeman around there that you saw?
A. Yes sir.
Q. The conductor was up at the depot, was he not?
A. I couldn't tell.
Q. He wasn't anywhere around there?
A. I don't know.
Q. You say you gave him this spot signal and then immediately went in around behind the car?
A. Yes sir.
Q. What was the first thing you did after you went in?
A. Taken hold of the lifting pin on the south side of the car.
Q. Did you go across the track?
A. No sir; practically across.
Q. And you stood on the track and reached over for the lever like this?
A. I suppose you would call it reaching; I was partially on the south side of the track.
Q. Say this is the car. The lever extends out a few inches outside of the car, don't it?
A. No sir, I don't think so.
154 Q. It comes out to the side of the car?
A. All I ever saw *like* about two inches of going to the side of the car.
Q. The car projects out over the rail?
A. Yes sir.
Q. So the lever projects out beyond the rail?
A. Yes sir.
Q. So you go out to the South side of the track, and while still on the track, grasp the lever with the left hand?
A. Yes sir.
Q. And then grasp the knuckle with the right hand?
A. Yes sir.
Q. And while operating the lever with the left hand, you gave the knuckle a pull with the right hand?
A. Yes sir.
Q. And just then you heard the car coming?
A. Yes sir.
Q. And immediately then you started to get off the track?
A. Never did get to make a start, only in my mind.
Q. Point on this map, indicate as near as you can where you were when you heard that slack coming?
A. I couldn't point it out on the map there, because it isn't plain

anough, but I was somewhere between four and seven feet west of the switch.

Q. When you heard the slack coming?

A. Yes sir.

Q. And you say you had no opportunity to get off the track before the car struck you, throwing you down?

A. Yes sir.

155 Q. And you then tried to roll or throw yourself off of the track?

A. Yes sir.

Q. Now, as I understand you, the—Did you lay then on your left side or right side?

A. I was lying partially on my right side and back.

Q. More like this?

A. Like that (Indicating).

Q. And so then your left foot would be uppermost?

A. Caught first, yes sir.

Q. And the wheel, did it go through the bottom of the foot upwards or from the top of the heel down?

A. It didn't do either; it caught me on the leg, caught me right there.

Q. And it missed the ankle, did it not, the ankle bone?

A. There is the ankle, and the car wheel went right down, partially over the ankle.

Q. So that your foot was lying sideways like that?

A. That is the best I can tell you.

Q. Indicate there on that chair like your foot was lying?

A. I couldn't tell you positive, but I can give you something like it. My opinion is it was something on the order of that.

Q. In other words, you were almost clear of the rail when the cars came along?

A. Yes sir.

Q. Now, Mr. Brown, after this accident, the other trainmen, the other boys of the crew, picked you up and took you to the

156 caboose?

A. No sir, they brought the caboose to me.

Q. Brought the caboose to you and put you in it and got you to a doctor as quick as they could?

A. Yes sir.

Q. You were given a special train, an engine and a caboose made a special run with you all the way to Hugo?

A. By a conductor friend of mine asking them to.

Q. And Mr. Hohnsbeen, the assistant superintendent, told them to come on over?

A. No sir, I don't think he was there.

Q. Anyway the train went?

A. Yes sir.

Q. And you were taken to Hugo?

A. Yes sir.

Q. And then taken on the first through train to St. Louis, to the hospital?

A. Yes sir.

Q. You were taken to what is known as the Frisco Employes' Hospital, in St. Louis?
A. Yes sir.
Q. That is a modern hospital?
A. Yes sir.
Q. First class?
A. Yes sir.
Q. And you have no complaint to make of the treatment you got there?
A. No sir.
157 Q. You say Dr. Woolsey is here that treated you?
A. Yes sir.
Q. You say he did the best that could be done?
A. Yes sir.
Q. You think that he is a competent surgeon and gave you good treatment?
A. I know he is.
Q. You were kept up there in the hospital until about May 1st, I believe?
A. Yes sir.
Q. Then you went back home?
A. Yes sir.
Q. To Aylesworth?
A. Yes sir.
Q. Do you remember Mr. Baker, the agent who sits here coming to see you about the month of June?
A. Yes sir. He came twice; came in July and then in August, I guess.
Q. When he was there in June, and while your father was also present, you told him just in detail how the accident happened?
A. Yes sir.
Q. And at that time you made a written statement about how it happened?
A. Yes sir.
Q. Which you signed?
A. Yes sir.
Q. And that was done in the presence of and with the
158 knowledge of your father?
A. Yes sir.
Q. Who is an attorney?
A. Yes sir.
Q. Now, I will ask you if you made this statement at that time: After I made the cut on the M. P. & G. connection, I started and did ride out of the connection on the last car the engine had hold of, by riding on the brakebeam, with my hand on the grab iron. When I got beside the first car on the passing track, I started over to open the knuckle, so we could couple on, but didn't like the looks of the drawbar, I didn't think it would work and close the knuckle, and then followed the string out of the M. P. & G. connection. This string of cars was moving slow and no faster than a man could walk. I gave the engineer the stop signal, and the cars ran out over the switch some six or seven feet. I then set the switch for the passing

track and gave the engineer a signal to hold them. I walked east of the car, expecting the engineer would not move. I opened the knuckle with my right hand, when I heard the slack coming. I tried to get out on the left side of the track, and in getting away from the cars, I slipped and fell and rolled over twice in my effort to get away. I didn't get the draw-bar pin; in fact, didn't have time to work it, and don't know its condition. Did you make that statement at that time?

A. I made a part of that statement. As to the first part of it, I don't think I did.

159 Q. Then look at this document that I hand you. Is that your signature to each of these pages?

A. Yes sir, that is the one. The fellow came to me the morning after I had been operated on, or the morning before, I don't know which.

Q. This is the statement of June 20, 1911, by Mr. Baker, in the presence of Dr. Johns.

A. Yes, that is my signature.

Q. And that is Dr. Johns' signature, isn't it?

A. I couldn't tell you.

Q. Just look at that and see if that is the statement that was made at Aylesworth on June 20th? That is the one I just read you. I mean, is that the statement you signed at that time?

A. Yes sir, I suppose it is; it has got my signature.

Q. Now, I will read you the following statement from this statement that you say you signed on June 20th: When I got out beside the first car on the passing tract that stood east of the switch, I crossed over and started to open that knuckle, so we could couple on it, but I didn't like the looks of the draw-bar; I didn't think it would work and close the knuckle. Did you make that statement at that time?

A. It was something to that effect, yes sir.

Q. Now, I will ask you if you made this statement I will read to you also: I stood between the rails and went to lift the operating lever with my left hand, and open the knuckle with my right hand, when I heard the slack coming. I tried to get out on the

160 left side of the track. Did you make that statement?

A. I don't know whether it was exactly in those words or not. That is practically the statement I made to you awhile ago. I was partially on the south side of the track. There has been two years elapsed and as to the exact position, I will tell you the——

Q. "I didn't get the draw-bar open; in fact, didn't have time to work it, and don't know its conditions?"

A. Yes sir, that statement is true, if you will add to it that the lever was tried once.

Q. You state here you don't know its condition?

A. I don't think I ever said I didn't know its condition.

Q. You signed this at this time, and this has been over a year ago?

A. Yes sir, but I didn't write it.

Q. It was signed there in the presence of your father, was it not?

A. I don't know; I suppose he was there.
Q. Didn't he read it over?
A. I couldn't say.
Q. He was acting for you as your attorney at that time?
A. Yes sir.
Q. And legal adviser. Wasn't the statement read over to you after it was written out?

Mr. Cruce: We assume that it was.

A. It could be, or not; I don't remember.

(Witness excused.)

161 JOHN A. HAILEY, called as a witness on the part of the plaintiff, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. John A. Hailey.
Q. Where do you live?
A. Aylesworth.
Q. What is your business?
A. Practicing medecine.
Q. How long have you been practicing medecine?
A. A little over seven years.
Q. Are you a graduate of any school?
A. The Gate City Medical College. Before I attended that I was a student of the University of Texas.
Q. Do you occupy any position with the Marshall County Medical Board?
A. I am the secretary and treasurer of the Marshall County Medical Society, and have been for the last few years.
Q. Do you know Harry A. Brown?
A. Yes sir.
Q. Do you remember of his receiving an accident about the 20th of February, 1910?
A. Yes sir.
Q. Did you see him that day or night?
A. Yes sir, I saw him that night.
162 Q. Where?
A. At Hugo.
Q. What condition was he in, Doctor?
A. He was under an anesthetic then and in a condition of shock, incident to the injury.
Q. What kind was the shock, mild or severe?
A. It was severe.
Q. What time of night did you see him?
A. I suppose it must have been ten o'clock; I couldn't tell you the exact time.
Q. Had an operation been performed then or not?
A. Yes.

Q. Did you make any examination of his feet?
A. No sir, I didn't, just felt of one of his toes. His feet were tied up. I moved one of his toes that was tied up.
Q. Who was the attending physician?
A. Dr. Johns.
Q. Did you hear him say anything about whether or not he had removed any bones from the feet?

Mr. Klienschmidt: Objected to as irrelevant, incompetent and immaterial.
The Court: I think that is incompetent.

Q. When did you next see Harry Brown after that night?
A. I next saw him after he came back from the Hospital in St. Louis.
Q. Were you called to see him?
A. Yes.
Q. Have you seen him frequently or not since then?
163 A. Frequently.
Q. Well, Doctor, what condition—Did you examine his feet after he came back from the Hospital?
A. Yes sir.
Q. What condition did you find them in?
A. The right foot, the injury on the right foot had almost healed, but that on the left foot was still in pretty bad shape.
Q. Have you ever examined his feet to see whether or not there is any,—whether they are in their normal condition, or the bones are there or not?
A. His feet are in an abnormal condition, his left foot especially.
Q. What is the matter with it?
A. My opinion is that the bones have been crushed and some of them has been removed.
Q. What is the power of the foot, to move it at the ankle?
A. Passive motion can only be perfected in the left ankle joint and I think there is growing together of those bones.
Q. Is there any cure for that?
A. Why, I don't think so. In my opinion, there isn't.
Q. What is your opinion as a doctor as to whether there can be any operation performed that will restore the normal condition of the feet?
A. My opinion there is no operation known that can restore his left foot to a normal condition.
Q. Do you know of any operation that will restore his right foot to a normal condition?
A. I can't say.
164 Q. You don't know of any?
A. No sir.
Q. In the condition you found his feet, what would be your opinion as to walking on his feet or standing on them, would be free from pain or attended with pain?
A. I think there would be more or less pain attendant on the use of his feet.

Q. Were you called on to attend him some time in May or June after that?

A. In June, yes sir.

Q. What was his condition then?

A. I found him suffering with a violent attack of erysipelas.

Q. Where?

A. In the left foot and leg.

Q. What was the cause of that?

A. The origin of it was due to local infection of the wound by the erysipelas germ.

Q. Infection of the wound, you mean by that, poisoning?

A. Yes sir.

Q. Was that spell of sickness, was it serious or just ordinary or what?

A. I considered it very serious, very much so.

Q. Was his foot swollen or free from swelling?

A. There was some swelling there, yes sir, and a good deal of illness and a good deal of pain. His constitutional symptoms were highly magnified, considerable prostration.

Q. How much, do you remember?

A. Ranged 104 and 104½ or 5, and I think it ran a little
165 over 105; I couldn't say just exactly.

Q. Have you recently examined his feet?

A. Yes sir.

Q. What condition is the tissue in with reference to having resisting power to infection that may happen hereafter?

A. The vitality of the tissues, there *in* considerable reduction in the form, I want to say, in the vitality of the tissues; that is, they may resist infection as well now as they once could have if this injury had not been received. Here is the statement: the power of vital resistance has been reduced.

Q. Well, now, do I understand you that if he were to receive an abrasion of the skin on one of these feet, that he would be more liable to blood poison than he was before?

A. He would to Erysipelas; he wouldn't to blood poison.

Q. An infection of Erysipelas, is that dangerous?

A. At times, it is.

Cross-examination by Mr. Klienschmidt:

Q. Doctor, you say it was the left foot that was effected with Erysipelas?

A. Yes sir.

Q. Now, that hadn't entirely healed at that time, had it?

A. No, not entirely.

Q. There was sup-eration there?

A. Yes sir.

Q. That means that matter was still present?

166 A. Yes sir.

Q. Now, an open wound like that is peculiarly subject to infection?

A. Yes sir.

Q. And that was the reason that Erysipelas took hold in that foot, is because it was open?

A. Yes sir.

Q. Now, since that time, the wound has entirely closed up?

A. Yes sir, the wound has healed.

(Q. And in its present condition it is no more subject to Erysipelas than a man's right hand?

A. Of course, I will have to answer that like this, *this* that surface there, the continuity of tissue, is much more easily broken than it would have been if it had never happened. I think it is more apt to, yes sir.

Q. I say, without an abrasion, without an opening, it is not subject to Erysipelas?

A. I think it is.

Q. There has to be a scratch or breaking of the skin for there to be an infection?

A. Well, I said this, I mean this, that if was more subject to infection than it was if it had never been injured by the scratch.)

Q. But there wouldn't be any danger without an abrasion? What I am getting at is, I want to know whether it is necessary that there must be an abrasion or opening before an infection will take place?

167 A. The latest writers on that subject say, however, that we have these conditions of Erysipelas where we can't find an abrasion.

Q. The authorities say that?

A. Yes sir.

Q. And at the present time, there is no opening?

A. No sir, none that we can see.

Q. Now, it has been more than a year since that Erysipelas took place, hasn't it?

A. Yes sir.

(Witness excused.)

HARRY A. BROWN, recalled by the defendant for further cross-examination, testified as follows:

By Mr. Klienschmidt:

Q. Mr. Brown, you have no objection, have you, to Dr. Woolsey examining your feet?

A. None whatever.

Q. Now, since your return from the hospital at St. Louis, you have been living at home, there at Aylesworth?

A. Yes sir.

Q. You followed a business since that time, have you not?

A. A part of the time, yes sir.

Q. You are now engaged in the weighing business, are you not?

A. Yes sir.

Q. And are able to attend to that business?

A. Yes sir.

168 Q. Previous to being engaged in the weighing business, you were running a store at Aylesworth, were you not, a general merchandise store?

A Yes sir.

Q. Now, I notice that you are using a cane now, and I believe you have been since you came to this trial. I believe you stated on direct examination that a part of the time, at home, you didn't use a cane?

A. Yes sir.

Q. And part of the time you did?

A. Yes sir.

Q. That is, you are able to walk around without crutches or a cane?

A. When they feel in a certain way, as I told you while ago. When the weather is clear, they feel much better sometimes than they do at others.

Redirect examination.

By A. C. Cruce:

Q. Now, Ha[illegible] you say you went in some kind of business after you recovered, and got so you could walk about?

A. Yes sir.

Q. Where was that?

A. Aylesworth.

Q. When did you go into business?

A. About July.

Q. 1911?

A. Yes sir.

169 Q. How long were you in business? What business was it?

A. General mercantile business.

Q. How long were you in that business?

A. A little over a year.

Q. Well, did you make a success or a failure of that business?

Mr. Klienschmidt: That is objected to as immaterial.

Q. Did you make a success or failure of that business?

Mr. Klienschmidt: That is objected to.

Q. Are you capable of making a success in the mercantile business, or character of business you were in?

A. It don't seem like I am.

Q. Did you make a success?

Mr. Klienschmidt: That is objected to as calling for a conclusion.

The Court: Sustained.

To which action of the Court, the plaintiff then and there excepted.

Q. When was this statement made at Aylesworth? June 20th?

A. I don't know about that statement there. The time my signature was put there, the day I was sick in bed there at Aylesworth, sometime in June.

Q. Was that at the time you had this spell of Erysipelas that the doctor testified to?

A. Yes sir. Mr. Baker and Dr. Johns and Dr. Shular came over there.

Q. Who is Mr. Baker?

A. He is claim agent of the Frisco.

Q. And Dr. Johns was there?

170 A. Yes sir.

Q. He was the man that operated on you at Hugo?

A. Yes sir.

Q. Who else was there?

A. Dr. Shular at Durant.

Q. Who is he?

A. He is Company physician at Durant, I understand.

Q. Who else was with him?

A. Mr. Pollard.

Q. Who is he?

A. He is another claim agent.

Q. What did he say to you to get you to make this statement?

A. I couldn't tell you; he talked with my father.

Q. At any rate, you understood they wanted a statement?

A. Yes sir.

Q. And you gave them a statement?

A. Yes sir.

Q. Who wrote that statement?

A. Mr. Baker.

Q. And you signed it?

A. Yes sir.

Q. Now, I notice in this statement,—I didn't get the drawbar open. In fact, didn't have time to work it and don't know its condition. Did you have time to find out its condition?

A. I had time to find out by knowing it wouldn't work automatically.

Q. Did you ever have an opportunity since to examine that car and knuckle?

171 A. No sir.

Q. This statement also contains this: I was opening the knuckle in the usual and customary way I knew the knuckles were supposed to open. Were you trying to open that knuckle in the usual and customary way?

Mr. Klienschmidt: That is objected to as calling for a conclusion of the witness.

The Court: You can't lead him, but it is a matter that you can call his attention to.

Q. What is the truth, as to whether you were trying to open that knuckle in the usual and customary way?

A. Yes sir.

Q. This statement contains this: I know the knuckles are supposed to open by raising the operating lever, but they don't do it. You have to put your hand on the knuckle to open it. Now, suppose that

you came to the lever, one of these automatic knuckles, and you took hold of the lever and it wouldn't open the knuckle. What is the usual custom among the employes and brakemen of that road as to how they got the knuckle open?

Mr. Klienschmidt: That is objected to as irrelevant, incompetent and immaterial, and not tending to prove or disprove any issue in this case. They haven't alleged any custom.

The Court: I understand you have been over that statement and he is seeking to cross examine him on other statements in there.

Mr. Cruce: The facts show that the statement was drawn up by your claim agent. I think it is germane to the matter.

The Court: I will let him inquire about it, if it is in the
172 statement.

To which action of the Court, the defendant then and there excepted.

Q. You say in this statement that "I know the knuckles are supposed to open by raising the operating lever, but they don't work, and if they don't do it, you have to put your hand on the knuckle to open it. What is the usual and customary way? If you go to raise the knuckle with the lever and it doesn't raise it, how do you get the knuckle open?

Mr. Klienschmidt: Objected to as not being in the issues of the case, and incompetent, irrelevant and immaterial. The custom is not for the custom as to other knuc-les, but this particular knuckle.

The Court: I think the proof should be whether it was necessary to be done and not what the custom was, and let the jury pass on the necessity of doing it that way; not what the custom was.

Mr. Klienschmidt: The rules prescribed his duties.

Q. I understand you to say then, you went and tried to open that knuckle with the lever and it wouldn't do it?

A. Yes sir.

Q. What was it your duty then to do?

A. It had to be opened if there was a coupling made.

Q. How did you open it?

A. I couldn't do it without putting my hands on it.

Q. Did your duties require you, when the lever wouldn't work it, to go off and quit the train?

Mr. Klienschmidt: Objected to as argumentative and leading.

173 The Court: That is objectionable.

Q. Now, Mr. Brown, what was the condition—How long had you been sick when you made this statement at Aylesworth, with this Erysipelas, before these four railroad men got there to make this statement?

Mr. Klienschmidt: I object to that as assuming a statement of facts not shown.

The Court: Before these four men got there is objectionable.

Q. How long had you been ill before they were there?

A. I taken ill one day about eleven o'clock, and the next day, it seems to me like at about three, they were there, the best of my knowledge.

Q. What was your condition? Were you sick or well or suffering or how?

A. I wrote them I was mighty sick; I felt like it.

Q. Do you know how they found out that you had had that attack?

A. No sir.

Q. Don't know what brought them there?

A. No sir.

Q. Had you already, prior to that, given the railroad a statement?

A. Two of them.

Q. When had you given them the first statement?

A. Well sir, it was either one or two days after I got to the hospital, and I couldn't tell you which.

Q. Hospital in St. Louis?

A. Yes sir.

Q. Who was it?

174 A. Some little block-head.

Q. Who was he?

A. I don't k[illegible]

Q. Who was he working for?

A. He said he was working for the railroad.

Q. Was it a written statement or what?

A. It was a written statement; that is, I gave it to him and he wrote it down.

Q. Now, subsequent to that, did you give a statement before this statement at Aylesworth?

A. Yes sir.

Q. Was this the second statement that Mr. Baker got?

A. Yes sir.

Q. Where were you when you gave Mr. Baker the first statement?

A. In Aylesworth.

Q. How long after this first statement was it that you gave Baker the last statement?

A. It seems to me like I gave Mr. Baker the first statement on the 2nd day of June.

Q. And then this statement was about?

A. The 20th, it seems like.

Q. Nor, Mr. Klienschmidt asked you about being able to walk without your stick. You say that at times, in cloudy weather, your feet hurt you worse?

A. Yes sir.

Q. Whenever you can walk without a stick, you do it?

A. Yes sir.

Q. But it is always painful?

175 A. Yes sir.

Q. When you went to Hugo to have your operation performed, Dr. Johns saw it?

A. Yes sir.

Q. After he looked at your foot and examined it, what did he say about the necessity of amputating it?

Mr. Klienschmidt: Objected to as incompetent, irrelevant and immaterial.

The Court: He can state the condition of the feet.

Q. What did the doctor say at that time about the injury to your foot and how serious it was?

Mr. Klienschmidt: Same objection.

The Court: I will let him answer that.

To which action of the Court, the defendant then and there excepted.

A. He told me that I would lose my left foot and a portion of my right foot.

Q. What did you say to him?

Mr. Klienschmidt: Now, what is the materiality of that? I move that it be stri-ken out.

Mr. Cruce: It shows how serious it was. I apprehend that our friends will take the position that this man isn't hurt much, because he can walk without a stick.

The Court: He can testify about the severity of the injury as much as he pleases and what the doctor told him about the seriousness of it, but what the doctor said about his losing his foot, I don't think that is relevant or necessary.

176 Q. What did the doctor say about the injury to your foot?

Mr. Klienschmidt: That is objected to.

The Court: If it is going to what he said about losing his foot, it is sustained.

To which action of the Court, the plaintiff then and there excepted.

Q. What else occurred between you and the doctor there?

A. There wasn't much conversation on my part of it. When he made the examination, he told me, and everybody seemed to be talking about how bad it was, and I told him not to cut either one of them off, that I wouldn't give my consent to it at all, and he said it would be essential to cut this left one off, and that he didn't see how it could be saved.

Mr. Klienschmidt: We move to strike the answer out, as incompetent, irrelevant and immaterial, and not responsive to the question.

The Court: That part of the answer is immaterial.

To which action of the court, the plaintiff then and there excepted.

Q. These cars that you were coupling up and putting into that train, what kind of cars were they?

A. The car that I got crippled on was an empty stock car.

Q. I mean the other cars. Were they such cars as were usually used on that right of way, to be sent from one state to another?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

177 Q. Were those cars used in shipping freight by the defendant railroad, interchangeably between Arkansas and Oklahoma?

Mr. Klienschmidt: That is objected to for the reason that the witness has not shown that he is qualified to answer, and for the second reason, it calls for a conclusion. We make this concession: we concede that the railway is a highway of interstate commerce, and was being operated between Hope and Ashdown.

The Court: Overruled.

To which action of the Court, the defendant then and there excepted.

A. Yes sir.

Recross-examination by Mr. Klienschmidt:

Q. Didn't you tell me when I asked you before if you knew where any of those cars were going and you said not?

A. These special cars, I never saw the way-bills, but I never saw anything keeping the cars in Oklahoma or Arkansas.

Q. I asked you where these cars were destined to at that time?

A. I don't know where they were going at that time.

Q. With reference to this statement that was made at Aylesworth, and which you say both Dr. Johns and Dr. Shular were present, I will ask you to state if these doctors weren't both present by invitation of your father?

A. I don't think so.

Q. Do you know about that?

A. No sir.

Q. They were treating you, were they not?

A. Well, no, sir, they hadn't been previous to that.

178 Q. They came there for that purpose, to treat you, didn't they?

A. Yes sir, I suppose they did.

Q. Now, you were asked about Mr. Pollard——

Mr. Cruce: We object to him supposing.

The Court: It isn't material one way or the other.

Q. Being present, I will ask you to state if Mr. Pollard isn't the mutual friend that you referred to, that helped get your position?

A. Yes sir.

Q. He is a friend of yours?

A. Yes sir.

Q. And you considered him as such?

A. Yes sir.

Q. Now, when this statement was made in the presence of these doctors, wasn't your father present?

A. Yes sir, my father was present a portion of the time, and possibly all the time. It seems to me like he and Mr. Baker were the only ones in the room, the best I remember.

By Mr. Cruce:

Q. Harry, look there. Your name is signed in your hand-writing on the first leaf of that, isn't it?
A. Yes sir.
Q. And then signed against on the second sheet?
A. Yes sir.
Q. Then it is signed again over here and third time?
A. Yes sir.

(Witness excused.)

179 JOHN A. HAILEY, re-called as a witness on the part of the plaintiff testified as follows:

Direct examination by A. C. Cruce:

Q. Doctor, please state whether or not it is a fact that Dr. Johns and Dr. Shular came to Aylesworth at this time in June at your request?
A. Mr. Harry Brown, he was so sick we didn't know whether he was going to get well or not, and I told Mr. Brown the gravity of the case, and I told him it might be best, inasmuch as Dr. Johns had treated him, to come up to see him.

(Witness excused.)

And thereupon, the usual hour for the noon recess having arrived, Court was adjourned to one o'clock P. M. of said day.

And afterwards, to-wit, at one o'clock, the hearing of this cause was resumed, and the appearances were the same as in the morning, and the following proceedings were had, and the following evidence was introduced, in the order following, to-wit:

Agreement of Counsel.

It is agreed that this table from which we read is the duly authorized American table of mortality of insured lives.
The Court: Longevity.
Mr. Cruce: Yes sir. We offer the table, showing that the life expectancy of a party 22 years old is 42.2.
180 Mr. Klienschmidt: We object to that in this case, because it is incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and we think it should be offered by an expert, who can be cross examined, to show whether or not that would apply to persons who are engaged in hazardous business.
The Court: I will let it go in for what it is worth.
To which action of the Court, the defendant then and there excepted.

And here the plaintiff rested his case.

Whereupon, Counsel for defendant filed in open Court its demurrer to the evidence of plaintiff, which demurrer appears in the words and figures following, to-wit:

181 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Demurrer to the Evidence.

Comes now said defendant and demurs to the evidence of the plaintiff, for the reason that the same does not establish facts sufficient to entitle said plaintiff to recover.

R. A. KLIENSCHMIDT,
J. H. GRANT,
Attorneys for Defendant.

On the back of said demurrer appears the following endorsement: Filed in open Court Dec. 10, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

182 And the court, after hearing said demurrer and being sufficiently advised in the premises, overruled the same.
To which action of the Court, the defendant then and there excepted.

Whereupon, the defendant offered and introduced evidence in its behalf as follows, in the order following, to-wit:

Defendant's Evidence.

R. A. WOOLSEY, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name and residence, please?
A. R. A. Woolsey, St. Louis.
Q. What is your occupation?
A. Physician and surgeon.
Q. How long have you been following that profession, doctor?
A. Nearly nine years.
Q. Of what school are you a graduate?
A. St. Louis University.

Q. What is your present position, if any?
A. In charge of the St. Louis hospital of the Frisco employes.
Q. Is that the hospital referred to by the plaintiff as being the one in which he was treated in February of last year?
183 A. Yes.
Q. State whether that hospital is operated by the St. Louis & San Francisco Railroad Company or not?
A. It is not.
Q. By whom is it maintained?
A. By the employes.

Mr. Cruce: We object if the court please.
The Court: I will let it stand.

Q. Is that a separate organization from the Company?
A. Yes sir.
Q. State whether the surgeons in that hospital are employed by the employes' association or not?
A. Yes sir.
Q. They are. Are you acquainted with the plaintiff in this case?
A. Yes sir.
Q. When did you first meet him, Doctor?
A. On his admission to the hospital at the time of his injury, February 21st.
Q. Did you have charge of the treatment that was accorded to Mr. Brown in the hospital?
A. Yes sir.
Q. Just state briefly what that was, Doctor?
A. In these cases, we have to deal with infections usually, and the morning after his admission to the hospital, he was taken to the ex-ray room, where pictures were taken, and shortly after that, about 11 o'clock that forenoon, he was taken to the operating room, where he was given an anesthetic for the purpose of thorough dress-
184 ing, thorough packing, etc. The dressing was considered too severe, the first dressing, as we wished to pack it for proper drainage, was too severe, too painful without an anesthetic.
Q. Does the anesthetic render it painless?
A. Yes sir.
Q. Was the operation performed at that time?
A. Merely the removal of a small portion of the seam bone, just in front and below what was called the ankle bone.
Q. Did you have ex-ray photographs made at that time showing the condition of the feet?
A. Yes sir.
Q. Will you produce those, please?
A. (Witness does as requested.)
Q. Now, which foot does this photograph show (handing photograph to witness)?
A. That is the left foot.
Q. Will you show on there, please, the bone that you refer to?
—. ——.

The photograph referred to was here identified as defendant's exhibit 5.

Q. That is the ex-ray photograph of the left foot?
A. Yes sir.
Q. Taken before the dressing?
A. Yes sir.
Q. Just show the jury where the bone is that you spoke of as having removed?
A. This picture is taken, a lateral view, from this way. This is the little bone that was removed.
Q. That is the only bone that was removed from that foot in St. Louis?
185 A. Yes sir.
By the Jury: How large was that bone, Doctor?
A. About that size (indicating).

By Mr. Klienschmidt:

Q. You indicated to the jury the size of the bone as removed, state in measurement.
A. It is an irregular shaped bone, about ¾ of an inch through.
Q. Was it necessary to remove that bone?
A. Yes sir.
Q. I don't think I asked you before how much experience had you had in surgery at this time?
A. I have been associated in surgical work seven years, at that time.
Q. And have you had occasion, or not, during that time, to perform operations of similar character, Doctor, ligaments that were mashed, or cut, or bruised, etc.?
A. A great many.
Q. What other treatment was given this foot, now, besides that?
A. We packed the wounds with gauze, to facilitate drainage.
Q. Did you hear the testimony this morning, in which the plaintiff said that one of the doctors at Hugo informed him that he had taken out a hand full of bones from this foot?
A. Yes sir.
Q. I will ask you to state from your examination of this
186 foot, whether that statement was true or not.

Mr. Cruce: We object, if the court please, as irrelevant, incompetent and immaterial.

Q. State whether or not a hand full of bones had been taken out?
A. The only bone in the foot that had been cut loose of any part was this bone I indicated, and you see there just a little over half of it. I took the rest of it out.
Q. How long was the portion that was taken out previously, the length of it?
A. I took out about half of it. It was evidently in several pieces from the shape of the wound at that time. It had evidently ground up, that portion that had already been taken out, and it would have been a very little less than the part I indicated.

Q. In other words, the part that had been taken out, previous to your examination would be less than ¾ of an inch in diameter?
A. Yes sir.

Q. I will ask the reporter to identify this photograph. The photograph referred to was identified as defendant's exhibit 6.

Q. What is the photograph I hand you, identified as defendant's exhibit 6?
A. That is a picture of the right foot.
Q. Looking down at it?
A. Yes sir.
Q. When was that taken?
A. At the same time.
187 Q. Is that an ex-ray photograph?
A. It is not a photograph; it is a shadowgraph.
Q. That shows the bones?
A. Yes sir.
Q. Just state what treatment you gave this foot, doctor?
A. It was given practically the same treatment the other foot was given; no bones removed.
Q. No bones at all removed?
A. No sir.
Q. Was it necessary to remove any bones?
A. No sir.
Q. Now, just go ahead and state briefly what treatment was given plaintiff from this time on up to the time he was discharged from the hospital?
A. The wounds were dressed from time to time, and drained thoroughly to get rid of the infection that was already there, and that constituted the treatment.
Q. When was he discharged from the hospital, do you remember?
A. I do not; I have the records.
Q. Just refresh your recollection if you can, from the record?
A. May 1st.
Q. Can you state, Doctor, what is the character of the facilities offered by this hospital in St. Louis, as compared to others there?
A. As good as any in the city; as good as any anywhere. We have everything we can use.
Q. Equipped with all modern inventions?
A. Yes sir.
Q. State whether or not this plaintiff was given the most approved and scientific treatment with his feet?
188 A. He was.
Q. To save them in the best possible way?
A. He was.
Q. Now, in testifying this morning, plaintiff stated, on his right foot there was a hardness or pufliness on the bottom of the foot. Can you state from your examination that you made since coming here what is the cause of that?
A. Yes sir. The injury, there were three of the lesser bones back of the lesser toes, and that was such a minor injury as compared to

the rest of the foot that it wasn't given any attention, because the rest of the injury needed removal of the dressing every day, and in order to get a good result in a fracture, you have to leave the dressing on for quite a time. That fracture has been overlapping a little bit, causing a large callous, and can easily be removed.

Q. You say that that condition can be remedied by a slight operation?

A. Yes sir.

Q. And remove all complaint from that feature of the foot?

A. Yes sir.

Q. Would that operation on the foot—State what effect, if any, that would have upon Mr. Brown's ability to use that foot, the right foot?

A. The operation you have just mentioned?

Q. Yes.

A. It would make it—absolutely relieve him of any trouble in that foot.

Q. That is, you mean he could walk on the foot without inconvenience?

189 A. Yes sir.

Q. Would that condition compare favorably with the condition of the foot before it was hurt, after this operation was performed?

A. Yes sir.

Q. Now, you heard the testimony this morning, doctor, did you not, about the erysipelas in the plaintiff's left foot?

A. Yes sir.

Q. That is a disease that is communicated by infection, is it not?

A. Yes sir.

Q. That is, by a germ being allowed to enter a wound or open place?

A. Yes sir.

Q. This foot has healed up, has it not?

A. Yes sir.

Q. And there is no place there for infection to enter?

A. No sir.

Q. Any more than there is on a man's hand or arm?

A. No sir.

Q. Is there any reason to anticipate that Erysipelas would recur in this foot or either one of them?

A. No sir.

Q. Any other part of the body that would be scratched would be subject to Erysipelas the same as the foot, would it not?

A. Yes sir.

Q. Now, Doctor, did Mr. Brown say anything to you about how he received this injury?

A. He made a report to me, yes sir.

Q. What did he say about how it happened?

190 A. I would rather read from the report that is here. In answer to question 14 in our report (Reading from the report); what does injured person say was the cause of his injury?

Answer. (While trying to open the knuckle on the last car on the end attached to engine. The engineer started to back the train without a signal from myself. I then started to get off the track, but slipped, as everything was wet and slippery. I tried to throw myself off the rail, and was about off when my right shoe caught in the switch point. By that time the first truck had run over both my feet, and I then broke loose and rolled off the track.)

Q. He made that in conversation with you, did he?

A. Yes sir.

Q. I will ask you to state whether, by stating he slipped—in stating he slipped, he said that that was the cause of his falling?

Mr. Cruce: We object.

The Court: Sustained.

To which action of the Court, the defendant then and there excepted.

Cross-examination by A. C. Cruce:

Q. Will you read from the heading of that card upon which that report is made?

A. St. Louis and San Francisco Railroad Company. Surgeon's report.

Q. Where did you get that card upon which to make that report?

191 A. I don't quite understand.

Q. I say, does the railroad furnish you with those blanks upon which to make your report?

A. Yes sir.

Q. Now, who is Dr. G. W. Kale?

A. Chief surgeon of the Frisco.

Q. He is located at Springfield?

A. St. Louis; that is an old sheet.

Q. This report was made to him?

A. Yes sir.

Q. Now, one of these questions that you are asked to report on in this was this: Will any permanent injury or deformity result, and if so, what, and you answered yes?

A. Yes.

Q. Now, you said this hospital was supported by the employes of the railroad?

A. Yes sir.

Q. That is, each employe of the railroad is taxed so much monthly and so much monthly is deducted from his wages to support that institution?

A. Yes sir.

Q. Deducted by whom? The Frisco Railway?

A. Yes sir.

Q. How many photographs did you take there, doctor?

A. These two.

Q. No others?

A. No sir.

Q. Now, this left foot, just show to me from where you took the photograph on your foot?

192 A. The photograph was taken in that manner, with the plate under the foot; from directly above.

Q. What do you mean by the plate under there?

A. The ex-ray plate that that was a print from.

Q. It was under?

A. Yes sir.

Q. And what was this that was above?

A. The ex-ray tube.

Q. That doesn't show all the left foot, does it, Doctor?

A. No sir.

Q. In this photograph, it doesn't show the toes?

A. No sir.

Q. Or any of the bones connected out there?

A. Yes, it shows the bones in the foot, in the arch of the foot.

Q. It shows the bones in the arch of the foot and the bones in front of that, it doesn't show?

A. No sir, there was no injury there.

Q. You could have taken a photograph there and shown the toes of that foot?

A. Yes sir.

Q. But you didn't do it?

A. No sir; there was no injury.

Q. You say there was no injury on that left foot in front of the ankle bones or the instep bones?

A. In front of these bones showing?

Q. You say these are the instep bones?

A. Yes sir.

Q. Now, what did you do with these photographs when you took them?

193 A. Put them in the files.

Q. That who keeps?

A. The hospital.

Q. When did you submit them to the attorneys of the railroad or to the agents of the railroad?

A. I think today is the first time any of the railroad has ever seen them.

Q. Had any of the claim agents ever seen them?

A. No sir.

Q. Had they written you about them?

A. No sir. I wasn't requested to bring these along.

Q. Had you been in correspondence with the attorneys for the railroad?

A. Yes sir.

Mr. Klienschmidt: If the Court please, I don't think it is proper for counsel to take Dr. Woolsey's file here, or his correspondence and examine him about it.

The Court: Do you object to counsel examining him?

Mr. Klienschmidt: Yes, about his correspondence. It is immaterial, and can't go to prove any issue in this case whatever.

The Court: So far as I understand, the objection is well taken.

Q. How did you come in possession of that letter of November 20, 1912, from H. B. Spaulding, claim attorney, to G. W. Kale, chief surgeon?

A. It was turned over to me when I came down here.

Q. By whom?

A. Dr. Kale's chief clerk.

Q. Who is H. B. Spaulding?

194 A. General claims attorney for the Frisco; W. B. Spaulding.

Q. This letter states——

Mr. Klienschmidt: If the Court please, we object.

The Court: Sustained.

Q. I will ask you this, that if this plaintiff, at the time you took charge of him there, had not received the skillful treatment that he did receive, that he probably would have lost both his feet?

A. No sir. He could easily have lost the left foot, but no reason for losing the right foot.

Q. There was reason for apprehending the loss of the left foot?

A. Yes sir.

Q. That was a serious injury?

A. Yes sir.

Q. And a permanent injury?

A. To the left foot, yes sir.

Q. What operation is it that could be performed on the right foot to make it as good as the other?

A. An incision made on the ball of the foot, and that part of the callous that has been thrown down there and makes that place on the bottom of his foot, that could be removed and relieved.

Q. It would be necessary to remove the bone?

A. No sir, just the callous.

Q. It is painful to use that foot now?

A. Yes sir.

Q. And it never will be relieved, he never will be relieved

195 of that pain and trouble until he is operated on?

A. It isn't likely.

Q. The tissues of this foot are not as strong as they were before the injury, are they?

A. The tissues themselves are.

Q. Well, what is it that is not as strong?

A. There is not as much tissue there as there was.

Q. That foot would be more easily infected when an abrasion occurred, would be more easily effect- than if it had never been injured?

A. Not at all.

Q. That foot can resist blood poison or disease or injury just as well now as it ever could?

A. Yes sir.

Q. Did you get a report from Dr. Johns as to the operation that he performed on the foot?
A. He made no report.

(Witness excused.)

F. D. HOHNSBEEN, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury?
A. F. D. Hohnsbeen.
Q. Where do you live?
A. At Smithfield, Texas.
Q. What is your occupation at this time?
196 A. I am train master for the M., K. & T.
Q. At Smithfield, Texas?
A. Yes sir.
Q. How long have you been engaged in the railway business?
A. About twenty-five years.
Q. What position did you start in?
A. I started in as a porter.
Q. What positions have you occupied in the last twenty-five years?
A. Practically everything in the station, train and engine service except running an engine or fireman.
Q. Have you been engaged in the operation of trains?
A. Yes sir.
Q. Conductor or brakeman?
A. Yes sir.
Q. Freight trains?
A. Yes sir.
Q. What was your position in the month of February, 1911?
A. Train master for the Frisco.
Q. At Hugo, Oklahoma?
A. Yes sir.
Q. As such, did you have charge of what is known as the A. & C. Line?
A. Yes sir.
Q. Between Ardmore and Hope?
A. Yes sir.
Q. Are you acquainted with the plaintiff, H. A. Brown?
A. Yes sir.
197 Q. When did you first become acquainted with him?
A. It was shortly after I went to Hugo. I went to Hugo in 1909, in the fall, and it was sometime in the Spring, I believe, of 1910.
Q. How did you get acquainted with him? What was the occasion of it?
A. I don't recall where I first met him, but several people saw me in his behalf to get him on as a student brakeman. I believe his father was over to see me once and talked it over with me, and several other people.

Q. You say his father was there to see you about him?
A. Yes sir.
Q. Did you furnish him an application to sign for employment?
A. I sent one to him through the agent at Aylesworth.
Q. Was that returned to you signed up?
A. Yes sir.
Q. Is Defendant's Exhibit 1 that application that you sent him and that was returned, signed up at that time?
A. Yes sir.
Q. After this was signed up and returned to you, was the plaintiff put to work or not?
A. Yes sir.
Q. In what capacity?
A. As a student brakeman first, and afterwards as a regular brakeman.
Q. When was he put to work as a regular brakeman?
A. I can tell by referring to my seniority list; I have it here in my pocket.
198 Q. Just refresh your recollection.
A. His date is 4/10/10; April 10, 1910; that is his seniority date.
Q. He was assigned regular duty on that date?
A. Yes sir.
Q. Now, before assigning him to regular work, was the plaintiff required to pass any examination?
A. Yes sir.
Q. What was the nature of that?
A. It was an examination on our transportation rules. He first has to make student trips until the trainmen say he is competent, and then I examine him on transportation rules.
Q. Did you examine him on the book of rules that was in force at that time?
A. Yes sir.
Q. State whether or not he showed he was familiar with them?
A. Yes sir, passed the examination.
Q. Is Defendant's Exhibit 2 a copy of the book of rules that was in force at that time?
A. Yes sir.
Q. And that is the book of rules that you examined the plaintiff on?
A. Yes sir.
Q. Was he furnished with a copy of this for his own permanent use?
A. Yes sir.
199 Q. Mr. Hohnsbeen, as superintendent, did you attract particular attention of the plaintiff to any of those rules in particular before he went to work?
A. Yes sir.
Q. Just give the numbers of them?
A. 634 to 638, inclusive, in our rules.
Q. Now, I will ask you to state whether or not —, as part of your

duties as superintendent to see that the trainmen performed their duties?

A. Yes sir.

Q. To carry out the rules and instructions of the company?

A. Yes sir.

Q. Did you ever have occasion prior to the time of this accident to call the plaintiff's attention to any carelessness on his part?

A. Yes, I had him in the office once or twice, and also administered discipline once or twice.

Q. What was the occasion of that, Mr. Hohnsbeen?

A. I don't recollect without referring to the file. I remember one case where Conductor Swartz turned him in to me.

Mr. Cruce: We object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. State whether or not there was one occasion where he had gone past a switch?

A. Yes I remember that.

Mr. Cruce: We object, if the Court please?

200 The Court: Sustained.

Mr. Klienschmidt: We think it is material to show that the plaintiff had been warned about carelessness.

Mr. Cruce: We withdraw the object-. We shall ask, however, to apply the same rule to the engineer when we put him on.

Q. Just state what was the cause of Mr. Brown's having been reprimanded.

A. The case that Conductor Swartz had, he——

Mr. Cruce: Don't tell what Conductor Swartz said.

Q. What was he cautioned against doing? What did you caution him against doing when the case was reported to you? Did you caution him against doing or not doing anything, do you remember?

A. I cautioned him against the thing for which he was turned in.

Q. What was that he was turned in for?

Mr. Klienschmidt: If the Court please, he can tell what he said to this witness.

The Court: Can you say what you said to the plaintiff? What did you say to the plaintiff when you called him in?

A. I can't remember the exact language.

Q. Remember the substance?

A. I told him he would have to be careful or hit the ball.

Q. What did you say?

A. I told him he would have to be careful and hit the ball, and be careful.

Q. What does that mean, hit the ball?

A. Do a job of railroading.

201 Q. Does that mean——

A. To comply with the rules and get out and do a job of brakeman; that is what it means, hit the ball.

Q. Now, I don't believe you explained—you said before had been turned in to you, *what* explain what that means?

Mr. Cruce: We object to anything that any conductor or any official said to him in the absence of plaintiff. We object to what anybody else did. We object to any statement to anybody turning him in.

The Court: He don't seek to ask the witness that at all.

Cross-examination by A. C. Cruce:

Q. What rule was that?

A. 634 to 638.

Q. Now, 634 reads this way: All employes will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury and must not go between cars when they are in motion. You told him it was dangerous to go between cars when they were in motion?

A. Yes sir.

Q. And he understood that, didn't he?

A. Yes sir.

Q. Where were you when you told him he would have to hit the ball; where did that conversation occur?

A. I don't recollect, but I believe it was in my office.

Q. Where?

A. At Hugo.

Q. How long had he been working for the railroad?

202 A. I couldn't tell without referring to the record. I think it was about three months before he was injured; something like that.

(Witness excused.)

D. T. CHAMBERLAIN, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury, please?

A. D. T. Chamberlain.

Q. Where do you live?

A. Hope, Arkansas.

Q. What is your occupation, Mr. Chamberlain?

A. Locomotive engineer.

Q. For the Frisco railroad?

A. Yes sir.

Q. How long have you been in the railroad service, railroad business?

A. I have been running a locomotive about seventeen years.

Q. You were an engineer on the train that plaintiff here was braking on in February of last year?

A. Harry Brown?

Q. Yes.

A. Yes sir.

Q. On that day, between what points was that train running?

203 A. Hope and Ashdown.

Q. In Arkansas?

A. Yes sir, both points.

Q. What time did you arrive at Ashdown that day?

A. I have no record of the time with me.

Q. Was it morning or afternoon?

A. It was before noon, yes sir.

Q. What were you engaged in doing just prior to the accident? What was the crew of the train engaged in doing?

A. That covers a good deal of ground.

Q. Were you switching cars?

A. Yes sir, switching.

Q. Making up your own trains?

A. It seems to me we were doing station work at the time he was injured; that is, doing stave mill switching, it seems to me we were.

Q. You are familiar with the arrangement of the tracks there at Ashdown, are you?

A. Yes sir.

Q. Look at plaintiff's exhibit A. Is that a fair representation of the location of the tracks at that place?

A. Yes, fair; only fair.

Q. Just prior to the accident, you had gone into the M. P. & G. connection, backed in there with a string of cars?

A. Yes sir.

Q. Who was giving the signals to you at that time, which

204 brakeman?

A. Brown was following the engine.

Q. He was what is known as head brakeman?

A. Yes sir.

Q. That is the brakeman that looks after the head of the train?

A. He is the brakeman that follows the engine.

Q. After you backed in on that connection, what did you do?

A. I have no recollection; I don't remember those moves as they came.

Q. Did you stay in the connection, or did you come out?

A. We pulled out of the connection.

Q. That is, out onto the passing track?

A. Yes sir.

Q. Now, did Brown give you any signal after you got on the passing track?

Mr. Cruce: We object to that as leading.

A. After I pulled on the switch there, the signal was given to stop.

Q. What is that movement?

A. Downward movement of the arm.

Q. With the arm held out at the side?

A. Yes sir.

Q. Then what did Brown do?

A. There is a point right there that I am not sure. He gave me a

signal to back up, but whether it was after or before he threw the switch, I don't remember. He gave me a signal to back up. Now, it is a common custom——

The Court: Don't tell what the custom is; state what he did.

205 Q. Now, he threw the switch, did he; Mr. Brown did?
A. Yes sir.
Q. After you got past the switch there, you say Brown gave you a stop signal. Did you obey the signal?
A. Yes sir.
Q. What, if anything, did Brown do then, after you came to a stop?
A. There is the point that this other brought up. The signal was given to back up and I obeyed that, but whether this signal was given before or after he threw the switch, I don't know.
Q. It was given before or after he threw the switch?
A. Yes sir.
Q. Is that the way it was done?
A. The two signals were given.
Q. First a stop signal and then a back-up signal?
A. Yes sir.
Q. Now, did Mr. Brown give you a hold signal?
A. Not that I saw, no sir.
Q. Was he in plain sight of you?
A. He was in plain sight of me during all these moves, yes sir.
Q. Your place in the cab was on the right hand side, was it?
A. Yes sir.
Q. That would be on the north side of the track?
A. Yes sir.
Q. And the switch stand was on the north side of the track?
A. Yes sir.

Q. After Brown gave you the signal to back up, just show
206 the jury how that is given?

A. Now, that goes—he would be behind the engine, and the signal would be something like this, just the same as you would motion anyone to come towards you.
Q. Did you obey that signal or not?
A. I did.
Q. What did Brown do?
A. Along, after the engine started to move, along about that time sometime, Brown stepped in behind the cars.
Q. While the car was moving?
A. Yes sir.
Q. Did you get another signal from him?
A. No sir.
Q. What was the next signal you got from anybody?
A. The next signal I got was a stop signal from brakeman Godbold.
Q. Where was he?
A. He was down some three or four or may be five or six cars away.

Q. What direction were those cars?
A. East.
Q. Those were the cars standing on the passing track?
A. Yes sir.
Q. Did you notice how far those cars on the passing track were from the last car that you had hold of?
A. I couldn't make an accurate statement there now, as I have no memory of it much.
Q. Was it a long distance or a short distance?
207 A. It was some three or four cars away, but I couldn't give an accurate estimate of the distance.
Q. When Godbold gave you this stop signal, did you obey it or not?
A. It was obeyed immediately.
Q. What did you do then?
A. At that point, I remained on the engine, and so did the fireman, because we didn't know why the signal was given.
Q. When did you know Brown was hurt?
A. Godbold came up to us and told us.
Q. Then what did you do?
A. The fireman went back to him; I stayed on the engine three or four minutes before I went back.
Q. Then what did you do?
A. I don't know whether I went back or not; we cut loose from the cars and got a caboose. The usual excitemen- took place after an accident of that kind.
Q. How far did the cars that you had hold of with that engine run west past that switch stand after you came out of the M. P. & G. connection?
A. That is a point I couldn't give an absolute answer to. I wouldn't say over a car length, because that is about the usual distance we run out of a place like that.
Q. Now, what speed did you pull those cars out of the M. P. & G. connection, coming out on the passing track?
A. I can only answer that question along the lines of what speed is generally used. To say that I remember what speed I was using at that time, I can't answer.
Q. What is your best judgment about it?
208 A. Four or five miles an hour.
Q. Now, from your experience as a trainman, what would have been the safe way for Brown to have arranged the knuckle on that car for coupling?
A. The safe way would have been to *g*ave given me a stop signal where I would have seen it.
Q. That is, you mean to arrange the couple before he gave the back up signal?
A. Yes sir, or to follow, if he did give me such a signal, to be certain that I did get him.
Q. Are you certain that he didn't give you such a signal?
A. I never saw it.
Q. Were you looking at him all the time?

A. My attention was on him all the time.

Q. I will ask you if there was a safe way to arrange that soupling while the cars were coming out of the M. P. & G. connection?

A. There is not a practical way to arrange them while they were pulling out.

Q. If the train wasn't going any faster than a walk, it would have been perfectly safe to have followed them out?

A. That would have been safe in operating the lever. The lever would have been operated from the side of the car.

Q. That is from the south side of the car?

A. Yes sir, the lever would be on the south side of the car.

Q. After you got down off of the engine, after you were informed of the accident, did you have occasion to notice where the accident happened where Brown was run over?

209 A. No sir, I didn't, from the fact that I said a minute ago, during the immediate part of the accident and taking care of Mr. Brown, those points were overlooked.

Q. What is your estimate or judgment as to how far you backed those cars after Brown gave you the back-up signal, and before they were again stopped by Godbold?

A. As I remember the situation now, probably four car-lengths, as I remember the situation.

Cross-examination by A. C. Cruce:

Q. Who was in the cab with you, the engine?

A. Fireman Baird.

Q. Anyone else?

A. Not that I know of.

Q. Do you know Frank Robison?

A. Yes sir.

Q. He was in there, wasn't he?

A. I said I didn't know it if he was.

Q. Do you know it now?

A. No sir.

Q. What is your recollection if he was in there?

A. Didn't I just tell you I didn't know.

Q. If he was in there, he had no right to be there, did he?

A. Yes sir, he had a right to be there.

Q. Frank Robison?

A. Yes sir.

Q. Doesn't rule 565, that you have just identified, provide that engineers will not permit anyone to ride on the engine without proper authority?

210 A. He was a brakeman.

Q. And he had a right to be in there?

A. Yes sir.

Q. Was Frank Robison on duty then?

A. Yes sir.

Q. What was he doing then?

A. He was helping the other crew.

Q. What other crew?
A. There was another crew there in the yards, getting ready to leave.
Q. Getting ready to leave where?
A. I don't know.
Q. Whose crew?
A. I don't know.
Q. How do you know there was another crew there?
A. I saw them there.
Q. Don't you know that the crew that was there was making up, waiting for the train to be made up, to bring it on to Hugo?
A. I know there was a crew there waiting for that.
Q. And those were the cars that you were shaping?
A. I don't know that they were.
Q. You were told that they were?
A. No, I wasn't.
Q. What were you switching those cars for?
A. I don't know; that is not my business.
Q. You were just on the engine there, running a car and not knowing what it was for?
A. No sir.
211 Q. Where had you come from that day?
A. Hope.
Q. And brought a car up to Ashdown?
A. I don't know whether we did or not; I have no record of it.
Q. Did you not?
A. I don't know.
Q. How did you get from there up to Ashdown?
A. I rode on the engine.
Q. Didn't you bring a train of cars?
A. I don't know; I have no record of it.
Q. You understand, you are under oath, and you tell the jury that you came from Hope and Ashdown on the engine?
A. Yes sir.
Q. And you don't know whether that engine pulled a train or not?
A. I have no record of it.
Q. Do you know this man, Godbold?
A. Yes sir.
Q. You, as engineer, you cut his arm off since then, didn't you?
A. He had an accident.

Mr. Klienschmidt: That is objected to as improper and prejudicial.

The Court: Gentlemen, you will pay no attention to that.

Redirect examination.

By Mr. Klienschmidt:

Q. Mr. Chamberlain, you say there was another crew there, waiting in the yards?
212 A. Yes sir.
Q. That was the crew that had charge of the local, west bound?

A. It was not the west bound local, but I don't remember the crew.
Q. You don't remember the train it was on?
A. I have no records of anything but the movement of the engine; that is the only record I keep.
Q. In other words, you don't charge your mind?
A. No sir.
Q. With what cars you move?
A. No sir, I keep no record; I have nothing to do at all with that part of it; the locomotive is all I have charge of.
Q. Your run that day, as I understand, was from Hope to Ashdown?
A. Yes sir.
Q. And from Ashdown back to Hope?
A. Yes sir.
Q. Hope is where you tied up?
A. Hope is my home, yes sir.

(Witness excused.)

H. H. BAIRD, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. What is your name?
—. ——.
213 Q. Mr. Baird, where do you live, please?
A. I live at Hugo, Oklahoma.
Q. What is your business?
A. That of locomotive fireman.
Q. For the railroad company?
A. Frisco Railroad, yes sir.
Q. How long have you been in the railroad business?
A. I have been in the service a little over seven years.
Q. As fireman?
A. No, it will be seven years the first day of next July, as fireman.
Q. Were you firing on the engine in which Chamberlain was engineer, the one Brown was hurt at Ashdown?
A. Yes sir.
Q. Which side of the engine were you riding on?
A. The left side?
Q. That is the fireman's side?
A. Yes sir.
Q. Now, do you remember what movements were made by the engine, and the cars attached to it, before you went back onto the passing track?
A. The best I can remember the movement, we pulled west and started out of the M. P. & G. connection, and started to back back east on the passing track.
Q. Well, do you know where Brown was at that time?
A. No sir.

Q. He wasn't on your side of the engine?
A. No sir, they all work on the engineer's side, except in the oil mill, at Ashdown.
214 Q. Do you know how far the cars attached to the engine were pulled west from that switch?
A. No sir, I don't. I wasn't in a position that I could see the switch stand; it was on the north side of the track, and I couldn't see it.
Q. After they came to a stop, how far were the cars backed up on the passing track before they were again stopped? Can you estimate?
A. No sir, I couldn't tell you how far they were backed back.
Q. Have you any judgment in the matter at all?
A. No, nothing only that it wasn't any great distance, nothing like eight or ten car-lengths, I couldn't think, but I wouldn't try to put it in a car-length or two of it at all.

Cross-examination by A. C. Cruce:

Q. Did you see Brown after he was hurt?
A. Yes sir.
Q. Did you go back there?
A. Yes sir, I went back there.
Q. Where did you find him?
A. Well, sir, when we were notified of his injuries, I jumped off the engine and started back, and he was lying with the hands over the main line, one rail of the main line, and his feet was between the main line and the passing track, and I took hold of him and laid him down between the tracks, the passing track and the main line.
Q. What shape was his feet in?
A. There was one foot that was badly mashed in here, and
215 the right one was mashed down the instep, and the left was mashed right in here, the best of my memory.

Redirect examination.

By Mr. Klienschmidt:

Q. Did he say anything about how he happened to fall?
A. Yes sir, I asked him how he happe-d to an accident and he said he slipped and fell.

Recross-examination by A. C. Cruce:

Q. Did you take hold of this young man?
A. Yes sir.
Q. You had to hold him there, did you?
A. No, I didn't have to hold him. I just took hold of him. He was lying kinder on his hands and knees, and I just placed him back between the tracks, on his back, and began to rub his face and hands.
Q. Did he seem to be suffering?

A. Yes sir, seemed to be. We got him as quiet as we could. I didn't want him to holler and take on any more than he could out there until we could get medical aid.

Q. You got medical aid there as quick as you could?

A. Yes sir, we sent a negro to the mill for the doctor——

Q. Where was Mr. Robinson?

A. I think Mr. Robinson helped me lay Mr. Brown between the tracks; I wouldn't be sure, but I think he was the man.

216 By the Court:

Q. Do you know the signals?

A. Yes sir.

Q. What does that mean (Indicating)?

A. Spot sign.

Q. What does that mean?

A. Give time between, or that they ain't going to move any more on the spot. After you have stopped, that means stand still until further signals.

By Mr. Klienschmidt:

Q. You didn't see any spot signals given there?

A. No sir.

(Witness excused.)

JOE PIERCE, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.

A. Joe Pierce.

Q. Where do you live, Mr. Pierce?

A. At Hope, Arkansas.

Q. What is your occupation?

A. Conductor.

Q. For the Frisco?

A. Yes sir.

Q. How long have you been in the railroad business?

217 A. About twenty years.

Q. In what capacity?

A. Brakeman and conductor.

Q. Has that experience been *or* freight or passenger trains?

A. Both; mostly on freight.

Q. Were you employed as conductor in February, 1911?

A. Yes sir.

Q. Were you the conductor of the train on which Brown was braking when he was injured?

A. I was.

Q. On that day, between what points was that train running?

A. Between Ashdown, Arkansas, and Hope, Arkansas.

Q. Which place did you start?

A. Started at Hope.

Q. And ran to Ashdown?
A. Yes sir, and turned and returned to Hope.
Q. The same day?
A. Yes sir.
Q. What time did you get to Ashdown, Mr. Pierce?
A. 10:25 A. M.
Q. What was the crew engaged in doing after that arrived there until this accident?
A. Doing the station work around Ashdown, and making up the train to take back east.
Q. Where were you at the time of the accident?
A. At the depot.
Q. What were you doing?
A. Checking up the way-bills.
218 Q. What was the first you heard of the accident?
A. Mr. Brakeman Godbold came up with the engine and caboose, and told me that Mr. Brown had got injured.
Q. Did you go to the scene of the accident?
A. I went back with them, yes sir, on the caboose, took the caboose back to where Brown was.
Q. What did you do with Brown?
A. Put him in the caboose and took him back to the depot.
Q. What did you do about furnishing medical aid?
A. We had the doctor over in a few minutes, as quick as we could get one.
Q. Then what did you do with him?
A. The doctor took charge of him, and after we got ready, we sent him to Hugo on a special train, en route to the hospital.
Q. Sent him on a special train to Hugo?
A. Yes sir.
Q. Did you on that day have occasion to notice where this accident happened?
A. Yes sir.
Q. Look at this photograph that I hand you (Indentified by the stenographer as defendant's exhibit 7)—I hand you defendant's exhibit 7 and ask if that is a correct representation of that passing track there at Ashdown, looking east?
A. Yes sir, that is a very fair representation.
Q. State whether or not this switch stand at the left of the picture is the switch stand for the M. P. & G. connection?
A. It is.
219 Q. You say you made a note of where the accident happened? You made an examination of the track conditions there to ascertain where the accident happened?
A. Yes sir.
Q. How far east of that switch stand do you say that Brown was run over?

Mr. Cruce: We object to that for two reasons: he has already stated that he didn't know where it happened and this question is leading.

Q. Did Mr. Brown tell you where the accident happened?

A. No sir, he didn't point out the exact spot, but the blood was on the rail, you could see where it happened.

Q. Where was that please?

A. It was about twelve or thirteen feet from the end of the switch point.

Q. Which way?

A. East.

Q. How many feet would that be east of the switch stand, as near as you can get it?

A. Just about twelve feet from the switch point, and the switch stand would be about four feet from the opposite rail, on the north side of the track.

Q. Now, what do you mean by the switch point on this photograph? Is that on the south or north rail?

A. It is on the south rail; this is the switch point (Indicating.)

Q. That is the point of the connection?

A. Yes sir.

Q. From the end of that switch on the south side of the
220 track is what is called the switch point?

A. Yes sir.

Q. You say the blood was on the rail twelve or thirteen feet——

A. East of that point—extreme west end of that point.

Q. And that would be more than twelve or thirteen feet east of the switch stand?

Mr. Cruce: Objected to as leading.

The Court: Sustained.

Q. How far would it be east of the switch stand?

A. Straight across the point, it would be about twenty feet; if you go diagonally across to that point, it wouldn't be quite so far.

Q. I mean east and west. Where do you want to start to from the switch point across here east?

A. It would be something like eighteen or twenty feet; something like that.

Q. Were there any blood indication on the rail at any other point except that? Was that the only point you saw blood on the rail?

A. Yes sir, just a place may be eighteen or twenty inches long on the rail.

Q. Did Mr. Brown tell you in the course of conversation how he came to be hurt?

A. When I asked him how it happened, he told me.

Q. What did he say?

A. He said he stepped in front of the car and fell.

Q. What was the number of the car that ran over Brown?
221 A. 27,442, I believe is the number of it.

Q. Do you know what were the initials of the car that——

A. C., St. P., M. & O.

Q. What kind of a car was it?

A. Box car.

Q. Was it loaded or empty?

A. Empty.

Q. Did you make an examination of the coupling apparatus at

the east end of the car, or did you see an examination made right after this accident?

A. Yes sir.

Q. Who was present at that time?

A. Car inspector Jakes.

Q. That is, the coupler on the car that ran over Mr. Brown?

A. Yes sir.

Q. What kind of a coupler was that car equipped with?

A. What is known as the La Trope.

Q. Is that a coupler that couples automatically, by impact?

A. Yes sir.

Q. How is it operated?

A. By a hand lever on the side of the car.

Q. Which side of the car was that lever on?

A. On the south side.

Q. What inspection or examination did you and Mr. Jakes make of that coupler?

A. We tried the lever to operat- the pin lifter to open the knuckle.

Q. Was that done before the coupler had been changed or
222 distrubed?

A. Yes sir.

Q. And before it was coupled to any other car?

A. Before the car had been moved.

Q. When you operated that lever on the south side of the car, state whether or not it threw the knuckle open?

A. It opened the knuckle so it would couple all right; threw the knuckle open like it was made to work; worked in good order.

Q. Did you try that only once or more than once?

A. I tried it there at Ashdown and Mr. Jakes tried it.

Q. Was there anything the matter with the coupler?

A. Not a thing that I seen.

Q. What is the proper way to operate one of these automatic couplers?

A. They are made to operate with a hand lever from the outside of the car.

Q. This coupler did operate that way?

A. Yes sir.

Q. Without putting your hand on the knuckle?

A. Not necessary to put your hand on the knuckle.

Q. I will ask you to state if that coupler was in condition so that it would work, and that it did work without a man going in front of the car, or on the track?

A. It worked when we tried it, by standing at the side of the car and working the lever.

Q. That is on the outside of the track?

A. Yes sir.

223 Q. Now, when operated in that way, is that safe for a brakeman or not?

A. Yes sir, it is safe. It is a safety appliance. If it wasn't everybody would get killed that ever tried to open one.

Q. Now, did you make any examination of the coupling apparatus on the other car?

A. Yes sir.
Q. That is the car that was stationery on the passing track, which was to be coupled on to the C., St. P., M. & O. car?
A. Yes sir, we tried the coupler on that.
Q. What kind of a coupler was that?
A. A Tower.
Q. Is that an automatic coupler?
A. Yes sir.
Q. That couples automatically, by impact?
A. Yes sir.
Q. What was the condition of that coupler?
A. It was in good working order.
Q. What was the lever on that car?
A. It was a continuous lever.
Q. That is, it operates from either side?
A. Yes sir.
Q. That is, you are speaking of the west end of that car?
A. The west end of the car.
Q. Did you make this examination immediately after the accident?
A. We examined both cars at the same time.
224 Q. What did you do with this other car—By-the-way, what was the number of this car that was on the passing track?
A. It was an A. C. L. car; I forget what the number of it is; I don't remember the exact number.
Q. It was an Atlantic Coast Line car?
A. Yes sir.
Q. Did you make the car report which shows the cars in that form?
A. Yes sir.
Q. I will ask you to look at that and refresh your memory, if you can, as to the number of this Atlantic Coast Line Car?
A. 29,929.
Q. What examination did you make of that Atlantic Coast Line car, as to the condition of the safety appliances, the couplers?
A. We examined it, operated the knuckle, to see that it worked.
Q. How did you operate the coupler?
A. We operated it with the pin lift.
Q. With the lever?
A. Yes sir.
Q. When you pulled or turned the lever, did it operate the coupler and throw the knuckle open?
A. Yes sir.
Q. Could you do that while standing at the side of the car?
A. Yes sir.
Q. And not on the track?
225 A. No, you don't need to go on the track to operate it.
Q. What is the safe way for a brakeman to prepare cars for coupling by impact?
A. To open the knuckles.
Q. How?

A. With the pin lifter.
Q. With the lever?
A. Yes sir.
Q. Standing where?
A. You have got to stand at the end of the car.
Q. There is where the end of the lever is?
A. Yes sir, the end of the lever is right at the end of the car.
Q. That is the car—you mean, or lever, will be at the end and on the outside of the car?
A. No, it is not on the outside; just in the clear; just inside of the car, four or five inches.
Q. Can a man, standing at the outside of the car, operate the lever on the end of the car?
A. Yes sir.
Q. Were you present when an examination of the couplers on both these cars was made at Hope?
A. Yes sir.
Q. Did you take both of these cars to Hope in your train?
A. Yes sir.
Q. On the same day of the accident?
A. Yes sir.
Q. What was done with them after they arrived there?
226 A. Left in the yards at Hope.
Q. How were they left? Were they left coupled together, or what?
A. Yes sir.
Q. With the same couplers they had over at Ashdown?
A. Yes sir.
Q. When was this examination made, the second examination?
A. I think it was the second day after the cars went in there.
Q. The 22nd of February?
A. Yes sir.
Q. Who was present?
A. Mr. Baker and car inspector Herring.
Q. Was Mr. Godbold present?
A. Yes sir.
Q. Mr. Roberts?
A. Yes sir.
Q. Mr. White?
A. Yes sir, Bails, W. D. Bails.
Q. Now, what was the result of that inspection?
A. The couplers were found working properly.
Q. When you went down to make the inspection, were the cars still coupled together?
A. Yes sir.
Q. Did you uncouple the cars by operating the lever?

Mr. Cruce: If the Court please, he has lead the witness long enough.
The Court: I think so.

227 Q. Tell what you did?

A. We separated the cars before the inspectors came down there; that is, before Mr. Baker or the inspector.

Q. How did you separate the cars?

A. Just pulled the lever and separated them before the inspecters came around.

Q. Then what did you do?

A. When Mr. Baker came up we all went down and inspected them.

Q. What do you mean by inspection?

A. We went down and operated these pin lifters or levers, and saw that these knuckles worked, operated the way they are made to operate.

Q. Was that on one car or both of them?

A. Both.

Q. What was the result of your inspection?

A. They were found to be working properly.

Q. Both of them?

A. Both of them.

Q. I will ask you to state whether or not they would couple automatically by impact, without going between the cars?

A. Yes sir, they would.

Q. And did couple?

A. Yes sir; and did couple.

Q. When you went down there right after the accident, Mr. Pierce, did you take any note of how far apart these two cars
228 were? That is, the C., St. P., M. & O. car and the Atlantic Coast line car there at Ashdown?

A. Yes sir; they were standing something like fifty or seventy-five feet apart.

Q. That was immediately after the accident?

A. That was when we went down and made the inspection, yes sir, just after we had taken care of Mr. Brown.

Q. Were the cars like they were at the time of the accident?

A. Just like they were; the engine hadn't been in there.

Cross-examination.

By Mr. Cruce:

Q. You had come in from Hope that morning?

A. Yes sir.

Q. Got there at 10:25?

A. Yes sir.

Q. Where did you leave your train?

A. Which train?

Q. The one you came in on?

A. We distributed it around the yards in Ashdown, where it belonged; put our merchandise cars on the tracks they belonged on.

Q. Was there an extra crew in there, another crew of men there?

A. Yes sir.

Q. What were they waiting for?

A. Waiting for the stuff we brought in?

Q. What do you mean by that? You mean the cars that
229 you brought in from the east?

A. The cars that we brought in from the east, they were going to take them on west.

Q. This other crew?

A. Yes sir.

Q. Whose crew were they?

A. Conductor Sanders.

Q. Where did that run go? From Ashdown on west to Hugo?

A. Yes sir.

Q. How many of those cars were to be taken on west?

A. I don't remember; I don't remember how many we had.

Q. Did you have any cars in your train that were to be taken on out to Hugo?

A. That I brought in there?

Q. Yes.

A. I couldn't say where they were to be taken to now; I don't remember.

Q. I understood you to say awhile ago that you had to switch in some of the cars that you brought in for them to take on west?

A. Yes sir.

Q. How many of them did you have?

A. I don't remember.

Q. Wouldn't your car record show?

A. Yes sir.

Q. Where is that record?

A. Right there in my overcoat pocket.

Q. Will you get it?

230 A. Yes sir.

Q. I wish you would get it and see where those cars were going. How many cars were there in that you brought into Ashdown that morning?

A. I brought in two cars, both of them for Ashdown.

Q. You just had an engine and two cars?

A. Yes sir.

Q. Didn't have any caboose?

A. Yes, two cars and the caboose.

Q. What did you mean awhile ago when you said you distributed cars you brought in to the different places?

A. We put them in to the merchandise tracks.

Q. When did you make that report?

A. On the second and 20th, 1911.

Q. You just had two cars that you brought in?

A. Yes sir.

Q. Now, what two cars were they?

A. This little bunch here is log cars that we left before we got to Ashdown.

Q. Where did you leave them?

A. One at a little place we call Thrasher and the others we left at mile post 662.

Q. What are these two cars here?
A. Those are the two cars of merchandise that goes to Ashdown.
Q. What did you mark them under the head of empties for?
A. That book is my personal property and I can keep it in any manner that suits me. That was my record and I under-
231 stand it.
Q. What under car number is that number B kind of car?
A. The book is supposed to be wider than it is.
Q. What part of it have you cut off?
A. You can see out here where it says division.
Q. Yes.
A. That part is cut off so it fits my train book cover. There is the two cars that we brought into Ashdown, just these two. This one we left at Thrasher, and these were left at Lathridge.
Q. What does it show of this record that you left them out there?
A. W 662.
Q. What does that mean?
A. That means that that is the mile post on that division.
Q. Where is the mile post on that division?
A. It is at W 662.
Q. Why didn't you keep the other two cars, the empties?
A. These two are loaded.
Q. The loaded ones then?
A. I left them at W 647; that is Ashdown.
Q. You stated awhile ago that you had brought in cars from Hope, some to be distributed there and some to be turned over to the crew that was going west, didn't you?
A. Yes, that is what I said.
Q. That wasn't right, was it?
A. I told you I didn't know what I had for the west.
Q. You say now you didn't have anything for the west?
A. I hadn't looked up that record; I hadn't paid any atten-
232 tion to that, didn't know the train of two cars were in question at all.
Q. When did you get this record?
A. That trainbook?
Q. Of course I am talking about this.
A. I made that, Mr. Cruce, on my arrival at Ashdown, before Mr. Brown got injured.
Q. In 1911?
A. Yes sir.
Q. Have you been using it ever since?
A. No sir. I filed it away. I have, I suppose, seventy-five of them.
Q. When did you file this away?
A. The date is in the back of the book.
Q. With whom?
A. With myself.
Q. You didn't turn it over to the railroad?
A. No sir.
Q. What are you laughing about, Mr. Pierce? Have you had a

conference with anybody representing the railroad since you came here, about this book?

A. No sir.

Q. Have you showed this book to any of them?

A. No, I don't believe that I have.

Q. Don't you know whether you have or not?

A. That *has* no one asked for it. I had it in my pocket when I started up here.

Q. Has anybody seen this book since you came up here?

233 A. Not that I know of.

Q. What are you laughing about?

Mr. Klienschmidt: I suggest to the Court that that is the natural state of the witness; smiling.

A. Mr. Cruce, I am not amused.

Q. I asked you this, a very simple question, whether you had shown this book to Mr. Baker or any of the attorneys for the railroad since you have been here?

A. I know I haven't shown it to Mr. Baker. I have had that book in my hand down at Mr. Klienschmidt's office, but I don't know whether he looked at it or not.

Q. You did have this book in your hands in your conference there, didn't you?

A. Yes sir.

Q. What did you have it out for?

A. I got it out to get these papers out.

Q. What are those papers?

A. They are just *disposition* that we got—instructions that I got in regard to what to do with Mr. Brown. The judge can look at them if he wishes, or any of you.

Q. What does M. D. & G. connection mean?

A. That is another little railroad that runs across the Frisco tracks at Ashdown, and that M. D. & G. Connection is where we gave them business, and got business from them.

Q. Where was the train crew of Mr. Sanders going that day?

A. I have nothing to do with them. I don't know that I know where they were going.

Q. What did you mean awhile ago when you said they were

234 going out west?

A. They came in from the west and were not going on through.

Q. Where did their run go to?

Mr. Klienschmidt: I object to that as wholly irrelevant, incompetent and immaterial, and has no connection with this suit.

The Court: I will let him answer if he knows.

Q. Where did their line go to, west of Ashdown?

A. They could run them to Hugo, or wherever the dispatcher wanted to run them to.

Q. One of these cars is number 29,929. Do you know where that car is now?

A. No sir.
Q. Have you ever seen it since?
A. No sir, I don't know that I have.
Q. That is a C., St. P., M. and O. What does that mean?
A. That is the name of a railroad up in Minnesota.
Q. That meant that the car belonged to them?
A. Yes sir.
Q. It didn't belong to the Frisco, then?
A. No sir, I think not.
Q. How did it get down there?
A. In the natural course of travel; somebody brought it in with the cars, or train.
Q. You took that car on back to Hope?
A. Yes sir.
Q. How long did it stay at Hope?
A. I couldn't tell you what day I brought it out of there, if
235 I ever brought it back.
Q. It wasn't a Frisco car, was it?
A. No sir.
Q. You said it was a Minnesota car?
A. It was what we termed a foreign car, some foreign line, foreign to the Frisco.
Q. When you took it from Ashdown back to Hope were you starting it back home?
A. No. We were using it at that time.
Q. How long did you use it before you started it back home?
A. We left it there. I don't know what became of it after we took it into Hope. The Hope people disposed of it.
Q. You took it into Hope empty?
A. Yes sir.
Q. Did you take it there to be loaded?
A. I don't know.
Q. At any rate, you didn't haul anything in it from Ashdown to Hope?
A. No sir.
Q. Were you instructed to take these two cars back to Hope?
A. Yes sir, they were going to Hope. That is the way—they were east bound cars.
Q. Was that the way they would have to go to get back to the Minnesota road?
A. I don't know that they were bound to the Minnesota road.
Q. I didn't ask you that. I asked you if that was the way to go to Minnesota?
A. I don't know.
Q. Now, this Atlantic Coast Line car, who did that belong to?
236 A. I don't know; it was a foreign car.
Q. Was it brought there empty?
A. I don't know. I took it out of there empty.
Q. Is there anything on it that indicates where it was to go to from Hope?

A. No sir.

Q. Is there anything in the record of the Frisco Railroad to show where that car went from Hope?

A. I haven't any record.

Q. I asked you if the railroad kept a record that would show where that car went?

A. I don't know what their record is. I have not got access to that record.

Q. You have been conductor for how long?

A. About twelve years.

Q. Now, listen to this question: Don't you know, from your experience with every railroad, including the Frisco railroad, keeps a record by which it can tell when its cars go to Ashdown, when the foreign cars come to their road and when they go back home?

A. Yes sir, they keep a record.

Q. Now, this Frisco has a record, then, that will show when these two foreign cars came in there, and when they went back home?

A. It will show disposition of the-, yes sir.

Q. It has that record, hasn't it?

A. Should have, yes sir.

Q. Have you seen this other car, this Atlantic Seaboard car, have you seen it since the accident?

237 A. Not that I know of.

Q. Now, this accident occurred about 11 o'clock?

A. 11:15

Q. How long had it occurred before you heard of it?

A. Possibly seven or eight minutes.

Q. What did you do when you heard of it?

A. I went down to where Mr. Brown was, from the depot.

Q. How far was he from the point of the accident?

A. He was right close to where he was injured, may be four or five feet.

Q. He hadn't been taken up then?

A. No sir.

Q. Doctor hadn't come?

A. No sir.

Q. You asked him then how it happened?

A. No sir.

Q. When did you ask him?

A. After we moved him in the caboos*k*se and brought him up to the depot.

Q. When was it you examined the place to see the blood on the rail?

A. When we went back down to examine the cars.

Q. After you put Mr. Brown in the caboose and took him up to the depot, you asked him on the way up there?

A. No sir, when I got there.

Q. And he said his foot slipped?

A. He said he slipped and fell. He didn't say his foot.

Q. Did he say anything about the car coupling being wrong?

A. No sir.

238 Q. You are sure about that?
A. Yes sir.
Q. Just said that he slipped and fell?
A. Yes sir.
Q. Did you have any reason to disbelieve that?
A. No sir.
Q. At any rate, then, after you had got him to the depot, you went back to examine the car?
A. When we had sent Mr. Brown on the way to the hospital.
Q. How long was that?
A. Possibly an hour and a half.
Q. Who did you go down — to examine the car?
A. Mr. Jacques.
Q. Who is he?
A. He is our car inspector at Ashdown.
Q. What did you take him for?
A. Took him along to help me examine the cars.
Q. You went on down there and took the car inspector to examine these knuckles?
A. Yes sir.
Q. What was the first thing you did when you got there?
A. That is the duty of the conductor.
Q. You took Mr. Jacques and went down there to examine the car?
A. Yes sir.
Q. And what was the first thing you did when you got there?
A. We looked over the ground where Mr. Brown had been, where he was injured.
239 Q. You saw blood?
A. Yes sir.
Q. Where did you see that blood?
A. Along the rail, on the track.
Q. How much blood was there?
A. Not much.
Q. Was there more on the rail that there was on the ground?
A. No sir.
Q. Where did it extend to from the rail?
A. Right out by the side of the rail, where Mr. Brown's feet were.
Q. How far from the rail?
A. About that far. (Indicating.)
Q. About eighteen inches?
A. Eighteen or twenty inches.
Q. On the south side of the rail or the north side?
A. South side.
Q. Now, there wasn't any blood south of twenty inches from that rail?
A. I couldn't swear it was just exactly twenty inches.
Q. About?
A. There is a little path between the tracks and the blood was right at the edge of the path, where the people walk up and down the track.

Q. You don't mean a path that he had made in walking himself there?
A. No sir.
Q. I understand you to say there was blood on that south rail?
240 A. Yes sir.
Q. That there was some blood that extended out eighteen or twenty inches from the rail?
A. What way do you mean?
Q. Was there or not?
A. Now, there was a pool of blood out from the rail.
Q. Then there wasn't any blood on south of that?
A. No sir, none that I saw.
Q. You looked?
A. Yes sir.
Q. There wasn't any blood there by the main track?
A. No sir.
Q. How far were those tracks apart there, the passing track and the main track?
A. About six feet.
Q. As soon as you examined this blood, you put down on your report, then, did you, about where you had found the blood?
A. Yes sir, I made a note.
Q. Then you and Jacques went and examined the car and couplings?
A. Yes sir.
Q. Which one did you examine first?
A. The one that Mr. Brown was injured on.
Q. That was the one that was attached to the engine?
A. That was the rear car from the engine.
Q. What was the first thing you did to examine that?
A. We tried the pin lifter, coupler.
Q. What reason did you have to expect that wazs out of fix?
A. We didn't expect it.
241 Q. What did you examine it for?
A. That is the requirements, to make our reports to the proper officers. These cars must be inspected by the inspector, in the presence of somebody; in the presence of one man.
Q. The couplings have to be inspected?
A. The whole car.
Q. What other inspection did you make of this car?
A. We looked after the safety appliances.
Q. You made a report of that?
A. Yes sir.
Q. Then, when you examined that, you then went and examined the couplings on the other car?
A. Yes sir.
Q. And yet this man hadn't opened his mo-th about either of these being defective?
A. No sir.

Q. He had stated to you that he slipped and fell?
A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. Mr. Pierce has by his questions to you tried to make it appear that we set a trap for him. I will ask you to state if you ever showed that book or said anything about the contents of it to any of the attorneys in this case?
A. I have not. I have had this book in my possession all the time, though.
Q. But you never showed it to the attorneys?
A. I opened it to get those papers out down in your office.
242 If — saw this book, you might have gotten it out of my pocket.
Q. While you were asleep at night?
A. You might have gotten it out of my pocket.
Q. You were asked why you went down there after this accident and examined these cars. Just explain why you did that.
A. It is absolutely necessary to render these reports to our superior officer, and here is the messages, the exact ones that I got that day for the report.

Mr. Cruce: Let me see that.

Q. You haven't read the message just now, but state if you were required by the company to make the report of the condition of the cars?
A. Certainly.

Mr. Cruce: We object to that. If the testimony is in writing, let him show it.

Q. Isn't that true any time there is any accident?
A. Yes sir.
Q. Whether to an employe or not, whether from machinery or not.

Mr. Cruce: It is a leading question, if the Court please.
The Court: Sustained.

Q. State why you made the inspection?
A. Question number 15, were cars, engine or machine inspected after the accident.
Q. Did you get that question before you made the inspection that day?
A. You have these in your possession all the time.
243 Q. It is your standard instructions that you have all the time?
A. Yes sir.
Q. So the company may know how the accident happened?
A. We keep these forms in our possession all the time, and make them out.
Q. I will ask you to state whether it is a part of your duties as

conductor of that train to make a report after every accident, stating the cause of it, and the conditions under which it occurred, etc.?

A. Yes sir.

Q. Do you object to me keeping this paper and examining it?

A. It is mine. If you want it, you can request it.

Q. I do request it now.

(Witness excused.)

DAN GODBOLD, called as a witness on the part of the defendants, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. What is your name?

A. Dan Godbold.

Q. Where do you live, Mr. Godbold?

A. I live at Hope.

Q. Are you married at this time?

A. No sir.

Q. Are you engaged in business or not?

A. No sir.

244 Q. What was your occupation in February, 1911?

A. Brakeman.

Q. For the Frisco?

A. Yes sir.

Q. Were you braking on the train that Mr. Brown was braking on at the time he was injured?

A. Yes sir.

Q. Between what points was that train running on the date of the accident?

A. Between Hope and Ashdown.

Q. In the state of Arkansas?

A. Yes sir.

Q. Where did you start from that morning?

A. Hope.

Q. Do you remember what time you got to Ashdown?

A. No, I couldn't tell you the exact time we got there; a little after ten o'clock, I suppose.

Q. Now, what were you engaged in doing? What was the crew engaged in doing just before the time Brown was hurt?

A. We were switching.

Q. Switching cars?

A. Yes sir.

Q. Was that—state whether that was making up the train or doing station work?

A. We were doing station work, and making up the train also.

245 Q. Now, referring to this place that has been introduced by plaintiff, as exhibit A. State whether you had gone into the M. P. & G. Connection with a string of cars to spot some cars there, just before the transaction?

A. Yes sir, we went into the connection.

Q. Did you ride the cars in there or go in with them?
A. Yes sir.
Q. Who else was along at that time?
A. Mr. Brown.
Q. Was he acting as head brakeman or rear brakeman?
A. Head brakeman.
Q. He was following the engine, in other words?
A. Yes sir.
Q. After you spotted the cars in there, what was done with the string?
A. We came out with the engine and what cars we had, and came against the passing track.
Q. Do you know how many cars the engine had hold of?
A. We had the caboose and about five or six cars, as well as I remember.
Q. Did you go along with those cars, or not?
A. No sir.
Q. What did you do?
A. I walked across to check the passing track.
Q. What do you mean by that?
A. I carried the switch list, gives the disposition of the cars.
Q. That is, the disposition of the cars that were sitting on the passing track?
A. Yes sir.
246 Q. How many cars were there left on the passing track?
A. Well, I couldn't tell you exactly how many; there were between seven and eight and nine.
Q. They were standing still there by themselves, no engine attached to them?
A. No sir.
Q. Now, can you say about how far the west end of these cars that were standing still on the passing track was from the switch from the east connection of the M. P. & G. connection?
A. That were between three and four car-lengths.
Q. East of that switch?
A. Yes sir.
Q. About how long would it be in feet? About how long is the average car?
A. Some is thirty-six and some is forty.
Q. It would be somewhere about a hundred feet?
A. No, it would be more than that.
Q. You say you walked from there to check these cars?
A. Yes sir.
Q. Did you observe what Brown did?
A. I saw Mr. Brown get off at the switch, and I couldn't see him any more.
Q. He got off at the switch?
A. Yes sir.
Q. Did he ride the string into the switch?
A. Rode it out to the switch?
Q. Yes.

A. Yes sir.

Q. Now, by the switch, do you mean where this switch track
247 is?

A. Yes sir, where the switch stand.

Q. For the M. P. & G. connection?

A. Yes sir.

Q. You saw Brown ride the car and dropped off about that switch track?

A. Yes sir.

Q. Did you see him come back to the cars that you were checking?

A. No sir.

Q. These cars that you were checking you say, the nearest one was over a hundred feet away from that switch stand?

A. Yes sir.

Q. What was the next you saw of Brown?

A. He was lying down on his hands and knees, between the passing track and the main line, shaking his head back and forth.

Q. That was after he was run over?

A. Yes sir.

Q. What did you do then?

A. I gave the engineer a stop signal.

Q. Did he obey it?

A. Yes sir.

Q. What did you do then?

A. I ran around on the fireman's side, past Mr. Brown, and ran up to the engineer, and told the engineer we had killed him, and the fireman and myself came back to him.

Q. Did you notice the point where he had been run over on the track? Could you tell by indications on the track where he
248 had been run over?

A. No sir, I never noticed anything on the track.

Q. What did you do with the plaintiff?

A. I didn't put my hands on him. Mr. Baird turned him over on his back.

Q. Did you go up to the station, or anyone else, to get help?

A. Someone got the connection, and we went on the main line and got the caboose. I helped put him in the caboose.

Q. Now, how fast was this string of cars miving out of the M. P. & G. connection toward the passing track?

A. I don't believe they were moving over three miles an hour.

Q. Now, I will ask you to state if Brown could have operated the lever and opened the knuckle on the coupler on the last car of that string while it was moving out on the passing track?

A. Yes sir, he could have got on the ground and followed it up and opened it.

Q. Moving at the rate of three miles an hour, would that, or not, be faster than a man could walk?

A. Well, I couldn't tell you.

Q. You think he could have followed it up behind the car and opened up the knuckle?

A. Yes sir.

Q. Would that have been a safe way to do it?

A. Yes sir.

Q. After Brown had been placed on the caboose and taken up to the depot, did you go back and notice whether there were indications on the rail as to where he had been run over?

249 A. Yes sir.

Q. How far was that point east of the switch point?

A. It was about fifteen or twenty feet.

Q. Look at this photograph that has been identified as exhibit 7, and state if that is a correct representation of the passing track there at Ashdown, looking east, showing the connection track?

A. Yes sir.

Q. Now, by the switch point, you mean that point on the right hand side of the track, the point of the switch? That is known as the switch point, is it?

A. Yes sir.

Mr. Klienschmidy: I would like to have this introduced in evidence, Defendant's exhibit 7.

Defendant's exhibit 7, which is a photograph, appears as follows:

(Here follows photograph marked page 249.)

250 Q. At any time after the accident, Mr. Godbold, did Brown tell you how he came to get hurt?

A. Yes sir. I asked Mr. Brown how he done it. He said he was opening a knuckle and slipped and fell.

Q. Did you say anything about whether the cars were stationary or moving?

A. No sir.

Q. Didn't say anything about that?

A. No sir.

Q. Were you present when the couplers on these two cars were inspected at Hope?

A. I was present when they inspected the couplers on the car that ran over Mr. Brown.

Q. Do you know what the number of that car was?

A. 27442.

Q. Do you know the initial of the car?

A. C. St. P. M. & O.

Q. What kind of a coupler was on there?

A. Latrope.

Q. How did it work?

A. It worked automatically.

Q. What do you mean by that?

A. Give the lever a quick jerk, and the coupler would fall open.

Q. When the knuckle is open that way, will any other car couple onto it by impact?

A. If the drawheads are sitting straight they will couple, and if they are not, they won't.

251 Q. Was this car coupled onto the A. C. T. car by impact after having opened the knuckle by the lever at the time of the inspection?

A. At Hope?

Q. At Hope, yes?

A. No sir, they were cut when I went down in the yard.

Q. Were you there when they pushed them together and coupled them up?

A. No sir.

Q. You didn't see them coupled together?

A. No sir.

Q. You saw the lever operating the knuckle, or throw the knuckle open?

A. Yes sir.

Q. That is, while standing outside of the track, you could operate the lever, you say?

A. Yes sir.

Cross-examination by A. C. Cruce:

Q. You had charge of the switch card that day?

A. Yes sir.

Q. And you—of course that was the card that directed where the cars were to be left and what were cut in and cut out, etc.?

A. Yes sir.

Q. And this boy had to follow your directions with reference to what cars to cut out, etc.?
A. Yes sir.
Q. Now, what did you say the number of this car was?
A. 27,442.
Q. When did you observe that number?

—. ——.

252 Q. The next morning down at Hope, when you were making the examination?
A. I don't know when I examined it.
Q. You didn't go back that evening, after this boy had his feet cut, to look at the car?
A. I knew it that day, after it ran over him.
Q. What called your attention to it?
A. We went back down there to look at the place where he got hurt, to see if we could find the place where he slipped.
Q. Did you find it?
A. No sir.
Q. You couldn't find it?
A. No sir.
Q. Who went with you to help you find it?
A. Mr. Jacques and Mr. Pierce.
Q. That this conductor Pierce?
A. Yes sir. I suppose Mr. Biard was there too.
Q. Did you examine the cars there?
A. Yes sir.
Q. Just state what examination you made?
A. I didn't make any examination at all of the cars.
Q. Who did?
A. Mr. Jacques, if anybody did.
Q. Did you see him making any?
A. Yes sir.
Q. What car did he examine?
A. 27442.
Q. What examination did he give it?
253 A. He said it was up to the standard.
Q. I mean, did you see what examination he made?
A. He looked over the car and inspected it.
Q. You don't know much about cars do you? You saw him raise that lever. Did you see him do anything else there?
A. I saw him look at the wheels under the car, at the grab irons; in fact, he looked all over it, as well as I remember.
Q. Did he make a report there then?
A. I don't know.
Q. That is all he did there then?
A. That is all I know that he did.
Q. Then, when were you called on to examine the cars again?
A. At Hope.
Q. You didn't find the number of any other cars there except this 27442?
A. No sir.

Q. At Hope you examined a couple of cars?
A. One car.
Q. What car?
A. 27442.
Q. Who was there to help you examine it?
A. Mr. Baker, Mr. Boils, Mr. Herring, Mr. Roberts and Mr. White.
Q. How come them all to go there and examine that car?
A. I was going down to the coal shed.
Q. What examination did you make of that car?
A. I just tried to pull the pin, to see if the knuckle would open.
Q. Did the other men do it?
254 A. Some of them did.
Q. Did it work?
A. Yes sir.
Q. Was there any engine there, or other cars?
A. Yes sir, there was an engine there.
Q. Did you couple the engine onto this car?
A. No sir.
Q. You didn't fix the coupling on the engine and back it back and see if it would work itself before you worked the lever?
A. Yes sir.
Q. Who else was there? Was Mr. Pierce there?
A. Yes sir.
Q. Did you see him work it?
A. I don't know.
Q. What is your judgment about that?
A. I don't know whether he worked it or not.
Q. Did anybody else do it?
A. Yes sir.
Q. How many do you think examined it?
A. I guess the whole bunch examined it.
Q. Pierce was there?
A. Yes sir.
Q. The engine wasn't coupled onto it though?
A. No sir.
Q. There were no other cars there?
A. Yes sir.
Q. Where were there any other cars?
A. The track was almost full.
255 Q. Wasn't this car coupled onto any other car?
A. It was cut on the end that Mr. Brown got hurt on when I went down in the yard.

Redirect examination.

By Mr. Klienschmidt:

Q. When you went down there, the others were already there?

Mr. Cruce: Objected to as leading.
The Court: Sustained.

Q. Did you go down there with the others or did they go there ahead of you?

A. No sir, I went up there and got my switch list and drifted down to the coal shed to do some work.

Q. When you got down there, who was there?

A. Mr. Baker was there and Mr. Boils and Mr. Herring.

Q. You wouldn't undertake to say what inspection they made before you got there?

A. No sir.

Q. You don't know about that?

A. No sir.

Q. But as far as your inspection went, the coupler showed up all right?

A. Yes sir.

(Witness excused.)

N. E. JACQUES, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

256 Direct examination by Mr. Klienschmidt:

Q. State your name?

A. N. E. Jacques.

Q. Where do you live, Mr. Jacques?

A. Ashdown.

Q. What is your occupation or business?

A. Inspector.

Q. For what road?

A. Frisco.

Q. What kind of inspector?

A. Car inspector.

Q. What are your duties in that particular?

A. Supposed to handle all interchange and all yard work, see that the cars are in good condition before leaving there.

Q. State whether or not that includes the condition of the appliances, coupling, etc.?

A. Yes sir.

Q. How long have you been in the railroad business?

A. About 24 years.

Q. In what capacities?

A. I have worked in the office, been round house inspector, worked building cars, and I have fired.

Q. State whether or not, during that time, you became familiar with the operation of trains?

A. Yes sir.

Q. And the different appliances that are used?

A. Yes sir.

Q. Coupling appliances?

A. Yes sir.

257 Q. On February 20, 1911, the day Mr. Brown was hurt, where were you working?

A. I was on the K. C. S. transfer.
Q. At Ashdown?
A. Yes sir.
Q. When did you first hear of the accident?
A. I saw the confusion up around the depot and walked out there, knew something was the matter from the moves the engine was making, and the noise; I knew something was the matter, so I walked up there.
Q. You knew Mr. Brown was run over?
A. Not until I got up there.
Q. Did you see Mr. Brown at that time?
A. I went in the caboose, yes sir, and saw him.
Q. Where was he?
A. He was lying on the caboose floor.
Q. Did you hear him talking any in there?
A. Somebody asked him how he got hurt, and I heard him say, it was in attempting to open the knuckle and he fell.
Q. Did he say anything about the knuckle wouldn't open?
A. No sir.
Q. State whether or not he made any statement about the condition of the appliances?
A. No sir.
Q. Made no complaint about that?
A. No sir, I didn't hear a word.
Q. Well, did you make any examination of those cars?
A. Yes sir.
258 Q. Do you remember the number of the cars you examined?
A. Yes sir.
Q. What are they?
A. C. St. P. M. & O., 27442, and Aclantic Coast Line car 29929.
Q. Where were those cars standing at the time you examined them?
A. On the east side of the passing track.
Q. Was anybody with you when you examined them?
A. Yes sir, the conductor and the K. C. S. inspector went down there with me.
Q. State whether or not it was part of your duties to make these examinations?
A. Yes sir, that is our instructions.
Q. Just state what you did with reference to the examination.
A. We went down there and inspected the safe appliances; that is, grab irons, couplers and any other defects the car might have, and found this was a practically new car.
Q. Which car was that?
A. 27442. Been rebuilt about a month, from the looks of it; had new couplers on it. They were exceptionally fine couplers, operating autimatically.
Q. What was the make of those couplers?
A. Latrobe.
Q. How did they operate?

A. Fine. They were automatic. That is, they fell open on lifting a lever.

Q. What did you operate the coupler with?

259 A. The pin lifter.

Q. Is that the lever that extends to the side of the car?

A. Yes sir, that is the lever that connects to the side of the car.

Q. Look at this, Defendants' Exhibit 3, Mr. Jacques, and state if that is a correct drawing of the Latrope couplers, such as this C. St. P. M. and P. car was connected with at that time?

A. Yes sir.

Q. Just explain to the jury, holding this so they will understand it, point out what is the knuckle, and explain to them how that opens when you operate the lever?

A. This is the coupler here; this is the knuckle; this lock in here, when raised there is that lock open. There is a piece on the bottom that, when it is raised to a certain point, strikes the tail of the knuckle and throws it open, and this locks here in two pieaces, and when this bottom——

Q. The lever is connected with this pin lifter right here?

A. Yes sir, it is connected on that, and on the tope and side of the car.

Q. When that is pulled, that comes up and throws this knuckle out and around?

A. Yes sir.

Q. Open this, so to speak, wide, so that the other coupler can go in there and take hold?

A. Yes sir.

Q. You say you made this inspection of the C. St. P. M. & O. car in this way?

260 A. Yes sir.

Q. Did you inspect the other car?

A. Yes sir.

Q. What was that car?

A. A. C. L., 29929.

Q. What was the coupler on that?

A. A. N. on the west side.

Q. What kind of levers did that have?

A. Continuous pin lifters, operated from either side.

Q. Ran clear across the car?

A. Yes sir.

Q. Did you inspect those?

A. Yes sir.

Q. How did they work?

A. Fine.

Q. State whether or not the knuckle would be thrown by the lever?

A. It is always automatic; you can't throw the lock without opening the knuckle.

Q. What is the proper way to operate this knuckle, in order to prepare them for coupling?

A. How do you mean?

Q. A brakeman wants to prepare the coupler to be coupled by impact?
A. Supposed to use the pin lifter.
Q. By standing off or on the track?
A. Off the track.
Q. Is that safe, when it is operated in that way?
A. Certainly.
261 Q. Now, could both of these couplers be operated in that way?
A. Yes sir.
Q. Did you make any—take any notice, or have occasion to observe where Mr. Brown was run over?
A. There was blood about twelve or fifteen feet from the switch point.
Q. Which way from the switch point?
A. East.
Q. The switch point is how far east of the switch frog?
A. It is opposite the switch frog.
Q. And this blood on the rail was fifteen feet east of that?
A. Yes sir, about twelve or fifteen feet; I never measured it.
Q. When you made this inspection, Mr. Jacques, about how far apart were the cars, the A. C. L. car and the C. St. P. M. & O. car?
A. I should judge about a hundred and fifty feet. The A. C. L., was on the road crossing and this car was nearly by the switch. I should judge it would be a hundred and fifty feet, may be a hundred and seventy-five; I don't know exactly.
Q. You say the St. Paul was almost at the switch?
A. Yes sir.
Q. And the other car was a hundred and fifty feet further east?
A. Yes sir.
262 Q. State, from your examination of these cars, whether there was anything the matter with these couplers or safety devices on either car?
A. No sir. This 27442 measured up to the standard safety appliances and the Atlantic Coast Line was the same way.
Q. That is, the standard prescribed by the Interstate Commerce commission?
A. Yes sir. The pin lifters measured the proper distance.

Cross-examination by A. C. Cruce:

Q. Now, Mr. Jacques, how long you say you have been working for the railroad?
A. 24 years.
Q. When you went up there, you asked Mr. Brown how it happened?
A. No, I was standing in there and somebody asked him.
Q. You say he threw open the knuckle, and fell?
A. Yes sir.
Q. You can open these knuckles by standing on the side?
A. Yes sir.
Q. You can stand on the track, at the end, and open them?

A. You can if you want to.

Q. And if the car is still, it is just as safe to stand there as it is on the side?

A. If the car is not moving, yes sir.

Q. But if the car is still, it is just as safe to stand between the tracks as it is out the outside?

A. Yes sir.

Q. Suppose there happens to be anything that the lever
263 wouldn't raise it, then you can take your hand and open the knuckle?

A. You can if the lever wouldn't raise it.

Q. I am not talking about this particular one; but if there should be anything the matter with the lever, if it should hang, and if the lever didn't raise it, you can open it with your hand?

A. If the lock sticks, you can open it with your hand.

Q. Can you open it at all if there is anything the matter with it?

A. Some of them can and some of them can't.

Mr. Klienschmidt: We object to this, if the court please.

Q. Could this one have been opened with the hand if there had been something the matter with the lever that it wouldn't open?

A. In a case of this kind, where they are automatic, if the lever won't raise them, I don't see how you can raise them.

Q. Couldn't open it with his hand?

A. If there had been something the matter with the lever, he could have raised the lock with his hand, and opened it, yes sir.

Q. Suppose that one of these automatic couplers, that there gets something the matter with one of the levers, there isn't anything to do to it then?

A. Our instructions are that——

Mr. Klienschmidt: We object.

Mr. Cruce: I will withdraw the question.

Q. Now, Mr. Jacques, you went down and determined what car went over Harry Brown?

A. Yes sir, the b-akeman pointed it out, and the conductor.
264 Q. You examined the knuckle?

A. Yes sir.

Q. And you went also and examined the knuckle on the other car that was some hundred and fifty feet away?

A. Yes sir. I have to examine the whole string.

Q. Did you examine them all?

A. Yes sir.

Q. And make a report?

A. Yes sir.

Q. Did you make a report on all of them?

A. No sir, not all of them; just the two of them.

Q. You satisfied yourself that day that these car couplers were in fine shape?

A. Yes sir.

Q. Did you have anybody there to help you except railroad men?

A. No sir.
Q. You knew they were in fine shape?
A. Yes sir.
Q. You examined them in a couple of days after?
A. No sir, they were examined.
Q. Weren't you there?
A. No sir.
Q. You were not down at Hope?
A. No sir.
Q. Did you make a report that evening?
A. Yes sir.
Q. As to the condition and what you found?
A. Yes sir.

Q. Now, this place that you found where the accident
265 happened, was some twelve or fifteen feet east of the switch?
A. Yes sir.

Q. You mean where the elevator switch ran in?
A. That is, the M. P. & G. connection.
Q. How could you tell?
A. There was blood on the side of the track.
Q. On the rail?
A. No sir, on the ground.
Q. Blood on the rail too?
A. I didn't see any blood on the rail.
Q. Who was there examining with you?
A. Mr. Pierce and Mr. Kelsey.
Q. Didn't you examine it by yourself?
A. No sir.
Q. Now, where was it you found this blood?
A. On the ground, on the south side of the track.
Q. South side of the rail?
A. Yes sir.
Q. How far was it from the rail?
A. I should judge about a foot and a half.
Q. How much blood did you find?
A. It was a pool about eight or ten inches square.
Q. And didn't find any blood on the rail?
A. No sir.
Q. Was there any more blood south of that little pool there?
A. I didn't see a bit; that is all I could find.

Q. Well, you looked for it?
266 A. No sir, I didn't look for it.
Q. You went down there with the conductor, didn't you?
A. Yes sir.
Q. Did he ask you to go or did you ask him to go?
A. I went down there, and he went down as a witness, and the K. C. S. Inspector.
Q. Who was the K. C. S. inspector?
A. Kelsey.
Q. Where is he?
A. He is bumming around over the country, and nobody knows where he is.

Q. How do you know that nobody knows where he is?
A. I have asked several people, and they don't know where he is.
Q. Why did you want to know?

Mr. Klienschmidt: We object to that.

A. I have worked with him several years.
Q. Now, as a matter of fact, wasn't there more blood on the rail than there was on the ground?
A. I didn't see any.
Q. Did you see any blood on the ground?
A. Yes sir.
Q. You could see the rail?
A. Yes sir.
Q. If there had been any blood on the rail, you think you would have seen it?
A. Yes sir, I think so.

(Witness excused.)

267 T. L. HERRING, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.
A. T. L. Herring.
Q. Where do you live?
A. Hope, Arkansas.
Q. What is your business?
A. Car man, car repairer.
Q. At Hope?
A. Yes sir, at Hope.
Q. What were you doing in February, 1911?
A. I was repairing cars.
Q. At Hope?
A. At Hope.
Q. How long had you been in that business?
A. About eighteen months.
Q. Do you remember having inspected some cars that came in about the 20th of February, 1911, in the presence of Mr. Pierce and Baker and Dan Godbold and some others?
A. I inspected all the cars that came in.
Q. Do you remember having inspected car C. St. P. M. & O. 27442?
A. Yes sir, on the 21st.
Q. 21st of February?
A. Yes sir.
Q. Where was the car when you inspected it?
A. On track number two of the L. & A. at Hope.
268 Q. Was it by itself or coupled up with a train?
A. Coupled up with the train.
Q. Do you know whether that was the train that came in from Ashdown the day before?

A. Yes sir.
Q. Had there been any change in that car since it came in?
A. No sir.
Q. State what you did?
A. On the 21st, the L. & A. man and myself inspected all the cars that came in, and we didn't find anything wrong with the car at all.
Q. Did you make any change in the coupler on that day?
A. No sir.
Q. Was it left just where it was?
A. Left just where it was.
Q. I will ask you if you made an inspection on the 22nd?
A. We did.
Q. Who was present at that time as far as you remember?
A. There were several present; Mr. Baker, Mr. Roberts, Mr. Chamberlain, Mr. Buel and Mr. White.
Q. Mr. Pierce there?
A. Yes sir.
Q. Dan Godbold?
A. Yes sir.
Q. What kind of an inspection did you make?
A. We took the engine out and cut the cars apart, and made an inspection of the coupler to see if it was in first class condition, which it was.
Q. What did you find the condition to be?
A. It was good; the condition of the coupler was good.
269 Q. Would the knuckles raise by operating the lever?
A. They would.
Q. From the outside of the car?
A. From the outside of the car.
Q. Did you inspect the A. C. L. car that was coupled onto the other one?
A. Yes sir.
Q. That was the one that was coupled onto the C. St. P. M. & O. Car?
A. Yes sir.
Q. Do you remember the number of that car?
A. 29929, I believe.
Q. What was the condition of the couplers on the A. C. L. car?
A. They were all right; in good shape.
Q. Did you work the levers on that car, throw the levers open?
A. Yes sir, we did.

Mr. Klienschmidt: If the court please, we would like to prepare this witness to show the jury how one of these couplers works.
The Court: Has he got a lever?
Mr. Klienschmidt: We have one of these couplers down on the track here, and would like to have the jury shown how that works, how the knuckle will work.
Mr. Cruce: You mean one of these two cars?
Mr. Klienschmidt: We have a car with the Latrope coupler on it.

The Court: You don't mean to say this coupler works
270 like that one?

Mr. Klienschmidt: No, just to show how the kind of coupler works.

The Court: If the jury don't understand it, and there is no objection by counsel, I have no objection.

Cross-examination by A. C. Cruce:

Q. Now, you examined these cars on the 21st?
A. Yes sir.
Q. How many were present there?
A. On the 21st, two of us.
Q. Then you examined them again on the 22nd?
A. Yes sir.
Q. What did you make a second examination for?
A. We made the second examination with Mr. Baker. He came down to examine the cars.
Q. How long did the cars remain there?
A. Just a few hours.
Q. What became of them?
A. The L. & A. took them.
Q. Where did they take them?
A. To Alexander, Louisiana.
Q. They were shipped there?
A. Yes sir. I don't say that car went there, but they started that way.
Q. You haven't seen it since?
A. No sir.
Q. What did you keep — there until the 22nd for?
A. Got orders to hold them.
Q. Where did these orders come from?
271 A. I couldn't tell you.
Q. Who did you get your orders from?
A. From my boss man.
Q. Who was he?
A. Mr. Boils.
Q. Who is he?
A. He is foreman of the yards at Hope.
Q. And he told you to hold them until the next day?
A. He didn't tell me. He told the L. & A. not to move them, which they did; they never moved the cars.
Q. When did these cars go up there?
A. The night of the 20th.
Q. When did you get orders to hold them there?
A. The next morning, I think it was.
Q. Had you hooked them up to send them on east?
A. No sir, they hadn't been bothered.
Q. You got orders to hold them until Mr. Baker came?
A. There he is; you can ask him.
Q. He is the claim agent of the Frisco?
A. Yes sir.

Q. He examined them?
A. Yes sir.
Q. And he got you to examine these knuckles on both cars?
A. Yes sir.
Q. What other examination did you make?
A. Not any that morning.
Q. How many cars were there?
A. I don't know.
Q. About how many cars you think were in that train?
272 A. I think there were eighteen or twenty may be in the bunch.
Q. Was that on the L. & A. train?
A. On the L. & A. tracks at the present.
Q. Whereabouts were those two cars in that train, about what part, near the front or the back?
A. I guess they were about eight or ten cars from the back end.
Q. How many of the cars in that train did you examine?
A. The whole train. We inspected the whole train on the morning of the 21st.
Q. Did you inspect the whole train again on the morning of the 22nd?
A. No sir, nothing only the two cars.
Q. Your attention wasn't especially attracted to these two cars until the 22nd, until Mr. Baker came?
A. Yes.
Q. And you examined the knuckles and saw that they worked?
A. Yes sir.
Q. Did Mr. Baker work them?
A. Yes sir.
Q. They lifted up all right in the lever?
A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. Now, with reference to the L. & A. road. You say these cars were delivered to that road?
A. Yes sir.
Q. Do you undertake to say where they went?
273 A. No sir.
Q. You don't know whether they were going to Louisiana, or to another point in Arkansas?
A. No sir.
Q. They were empty cars?
A. Yes sir.

Recross examination by A. C. Cruce:

Q. That L. & A. did run into Louisiana?
A. Yes sir.
Q. And they were their cars?
A. No sir, but they had them.

Q. When did you first see Harry Brown here after this injury?
A. I seen him in the St. Louis hospital.
Q. How long after the injury?
A. Well, I was there about the 18th of March, I believe.
Q. You had a talk with him about this?
A. I didn't have a talk with him until about the 28th or 30th, I guess.
Q. You did have a talk with him?
A. Yes, I talked with him while he was in the hospital.
Q. I will ask you if you didn't state to him there in the hospital that that coupler was out of fix?
A. No sir.

Redirect examination.

By Mr. Klienschmidt:

Q. You are positive about that are you?
A. Yes sir.

(Witness excused.)

274 J. E. ROBERTS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.
A. J. E. Roberts.
Q. Where do you live?
A. Hope, Arkansas.
Q. What was your occupation in February, 1911?
A. Cashier of the freight office for the Frisco at Hope.
Q. Did you have occasion—did you happen to be present at the time the two cars were inspected there in the yards at Ashdown about February 22, 1911?
A. Yes sir.
Q. You remember who else was present?
A. Yes sir, Mr. Baker, Mr. Chamberlain, Mr. Pierce, Mr. Godbold, Mr. Boils, Mr. Herring and Mr. White.
Q. Just state what you did, what you saw done there, or what you did with reference to these couplers?
A. He tested them to work the lever, to see whether the knuckle would open.
Q. What was the result of that inspection?
A. It would fall open.
Q. Was that true both as to the C. St. P. M. & O. car and the A. C. L. car?
A. I don't remember about the A. C. L.
Q. Were you there when that was examined or not?
A. I don't remember, but I remember about the other car.
275 Q. What was the result of that inspection of that car?
A. Well, I tried the lever, it would fall open, the knuckle would, and I watched the others try it too.

Q. Do you know when those cars came in there?
A. They came in there—I think they stayed there all the day previous to the day we tried them; I think they came in the night before.
Q. Were they still coupled up with the train they came in with?
A. Yes sir.

Cross-examination by A. C. Cruce:

Q. Let's get the names of those that were there. There was Baker and Pierce?
A. Baker, Pierce, Chamberlain——
Q. Is he a railroad man?
A. Engineer.
Q. And who else?
A. Mr. White.
Q. Who was White?
A. He was a clerk in the office.
Q. Who else?
A. Mr. Boils.
Q. Who is he?
A. He is yard foreman.
Q. Who else?
A. Mr. Herring, the car repairer.
Q. Who else?
276 A. Godbold.
Q. They were all there?
A. Yes sir.
Q. Now, that was the second day after the cars came in. The cars came in on the evening of the 20th, did they?
A. The night of the 20th.
Q. What were they held over there until the 22nd for?
A. I really don't know. I don't think I knew anything about it until I was asked to go around over to the inspection.
Q. Who asked you to go around?
A. Mr. Baker.
Q. Does anybody live in that town except the railroad employes? How big a town is Hope?
A. It is a pretty good town.
Q. Has it got a hundred people or a thousand?
A. The last official census gave it 3,750 I think.
Q. Did you have anybody there to help inspect that car except railroad men?
A. I think all that I remember were railroad men.
Q. How many cars were in that train that you inspected that day?
A. I don't know.
Q. What would be your judgment, Mr. Roberts?
A. I couldn't say. There were several. He had the engine to come up and cut the cars loose to get this car in the clear.
Q. Cut loose from both ends?

A. Yes sir, my recollection is that it was.

277 Q. And you examined—What examination did you mak of that car?

A. Just watched the other boys take hold of the lever and jerk and the knuckle would fall open.

Q. That is all the examination they made?

A. That is all I made, yes sir.

Q. What would prevent that lever, from the outside, from wor ing, from lifting—What could happen to it that would prevent from opening the knuckle when you would try to raise it?

A. I don't know.

Q. You don't know what condition it was in when it left Ash down?

A. No sir.

Q. And you don't know why it had been left there up until th 22nd?

A. I think it was held for examination.

Q. What became of it after that?

A. I don't know.

Q. What company did it belong to?

A. C. St. P. M. & *P.*

Q. Do you know what track it left on, if it did leave there?

A. No, I don't.

Q. Do you remember what number it was?

A. 27442, I think.

Q. How long has it been since you made this examination?

A. February, 1911.

Q. Nearly two years?

A. Yes sir.

(Witness excused.)

278 D. M. BALDWIN, called as a witness on the part of the de fendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury, please.

A. D. M. Baldwin.

Q. Where do you live, Mr. Baldwin?

A. I live at Garvin.

Q. Garvin, Oklahoma?

A. Yes sir.

Q. What is your occupation?

A. Well, I have been working for the Frisco, section foreman.

Q. Where were you employed in February, 1911?

A. At Ashdown.

Q. As section foreman?

A. Yes sir.

Q. Do you remember the occasion of Harry Brown being hur there on that date?

A. Yes sir, I remember it.

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Q. You didn't see the accident, did you?
A. No sir.
Q. How long after the accident was it that you heard about it?
A. About forty-five minutes.
Q. Did you go up to the scene of the accident?
A. Not until afternoon. I passed by it as I went to dinner.
Q. But in the afternoon you went up there?
A. Yes sir, I had a message from the road master to go up there.
279 Q. Did you make an examination for the purpose of determining where he had been run over?
A. Yes sir.
Q. What did you find?
A. I found a little bit of blood on the rail, and also some on the ground.
Q. Where was that?
A. It was about ten and a half feet east of the switch point.
Q. On which rail, the north of south rail?
A. On the south rail.
Q. Was that the only place you found blood or indications that he had been run over?
A. Yes sir.
Q. Did you make the actual measurement of that or just guess at it?
A. I measured it.

Cross-examination by A. C. Cruce:

Q. How far did you say it was?
A. Ten and a half feet from the switch point.
Q. Now, what day was that?
A. On the 20th day of February, 1911.
Q. What time in the day?
A. About one thirty, when I measured the place.
Q. Where were you when you got the information, or the instructions?
A. I was at work up on the K. C. S. transfer.
Q. There on that same day?
280 A. Yes sir.
Q. And when you went down there, did you find and cars on the track?
A. No sir, there were no cars on the track.
Q. Was this blood on the main track or passing track?
A. Passing track.
Q. Passing track or spur track?
A. Passing track.
Q. And it was ten and a half feet?
A. Ten and a half feet from the switch point.
Q. There is a crossing there, just west of it?
A. East of it.
Q. East of it? I mean public crossing.
A. Well, I don't know just exactly the distance to the crossing.

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Q. Did you measure that?
A. No sir.
Q. Why didn't you measure it?
A. I didn't think of it.
Q. Why did it occur to you to measure this to the switch point?
A. I had instructions to.
Q. Who told you to?
A. Mr. Baker.
Q. Mr. Baker told you about one thirty in the afternoon of the day of this accident, he told you to find how far east that was of the switch point?
A. No sir, Mr. Baker wasn't with me. I didn't measure it at that time; I didn't make these measurements until after-
281 ward.
Q. When did you measure it?
A. It was several days afterwards. I put a mark on the rail where it occurred.
Q. What mark did you put on the rail?
A. I put a chalk mark on it.
Q. Wouldn't the blood mark it?
A. Yes, but if it rained, it would wash the blood off, and Mr. Fountain instructed me to designate the exact spot.
Q. Wasn't there some blood on the ground?
A. Yes, but it didn't stay there.
Q. How long did it stay there?
A. Just a short time.
Q. How long?
A. I don't know exactly how long.
Q. Had the blood washed off when Baker sent you there to measure it?
A. Yes sir, when Mr. Baker came down there himself, the blood was gone.
Q. How many days was that after the accident?
A. I don't remember.
Q. About how long?
A. I wouldn't say; it was quite a while.
Q. A week?
A. Yes, it was more than a week.
Q. But you do know that Mr. Baker—Harry was still in the hospital at St. Louis then, wasn't he?
A. I don't know.
Q. Was it a month after the accident when Baker came
282 down there and told you to measure it?
A. No sir, it wasn't that long.
Q. How long?
A. Something like three weeks.
Q. Where did you put that chalk mark?
A. On the base of the rail.
Q. It is there yet, isn't it?
A. I don't know.
Q. When did you last look to see?

A. I haven't been there in sometime.
Q. The blood was all gone when you went there?
A. Yes sir.
Q. And it was exactly ten and a half feet to the switch point?
A. Yes sir.
Q. Who was it sent you up there to make that designation?
A. The road master, John Lagdon.
Q. Where is he now?
A. At Frances, Oklahoma.
Q. Did he tell you to make the chalk mark?
A. He told me to locate the exact spot and mark it.
Q. Did he tell you to make a chalk mark?
A. No sir.
Q. How came you to carry the chalk?
A. I carry it all the time when I am at work.
Q. Where was this road master that told you to do that?
A. He was at Hugo then; he wired me to go and do this.
Q. Did you find anything there?
A. No sir, nothing only a few cinders.
283 Q. Did you make a report to him?
A. Yes sir.
Q. Did you tell him you had made a chalk mark there?
A. No sir.
Q. Did you tell him you found blood there?
A. No sir.
Q. You didn't tell him how you designated it?
A. No sir.
Q. It didn't occur to you to measure it. When Baker came down there and wanted you to measure from where this chalk mark was up to this switch point, did he measure too?
A. Yes sir, I think so.
Q. Did he tell you to measure back to the crossing east?
A. No sir.
Q. Is there a crossing there?
A. Yes sir, there is a small crossing.
Q. You didn't measure to that?
A. No sir.
Q. There were no cars there?
A. No sir.
Q. Nor on the main track?
A. No sir.

(Witness excused.)

C. B. BURK, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

284 Q. State your name to the court and jury.
A. C. B. Burk.
Q. Where do you live?

A. I live at Hugo.
Q. Where were you living in February, 1911?
A. Living in Hugo.
Q. What were you doing?
A. Brakeman for the railroad.
Q. For the Frisco?
A. Yes sir.
Q. Were you at Hope, Arkansas, the day they made an inspection of the two cars, one of which was said to have run over Harry Brown?
A. I was there when they inspected one.
Q. Which one did they inspect while you were there?
A. I believe it was C. St. P. M. & O.
Q. Were several others present at that time, were there?
A. Yes sir.
Q. Just tell the court and jury what you did, what you ascertained at that time?
A. I started through the yards, and Mr. Baker, or someone, called me to come down there, and I walked down, and they were looking at the car, and examined it.
Q. What did you do?
A. I stood there and watched them work the knuckles, to see whether it was an automatic*al* coupler or not.
Q. Was it an automatic coupler?
A. Yes sir.
Q. Would it operate the lever?
285 A. Yes sir.
Q. When they raised the lever would it throw the knuckle open?
A. Yes sir.
Q. Did you try it yourself?
A. No sir.
Q. You watched the others do it?
A. Yes sir.

Cross-examination by A. C. Cruce:

Q. When was that, Mr. Burk?
A. It was sometime in February.
Q. That was the time Mr. Baker was there?
A. Yes sir.
Q. How many cars did you examine?
A. I just examined one.
Q. How many did the others examine? There were several cars there, weren't there?
A. They only examined one while I was there.
Q. Was Mr. Pierce there?
A. Yes sir.
Q. Did you see him examine it?
A. Yes.
Q. Isn't it a fact that there were just two cars standing there, and

Mr. Pierce had them cut apart, and you pushed them back together, and then separated again?

A. Not while I was there.

Q. That happened?

A. Not while I was there.

Q. They asked you to come there to be a witness?

286 A. Yes sir.

Q. You saw Pierce examine it while you were there?

A. Yes sir.

Q. What did he do?

A. As well as I remember now, I believe he operated it.

Q. How many cars were there?

A. There was only the one.

Q. How far was it off to another car?

A. I suppose it was about a car length; may be two car-lengths.

Q. You don't know where these cars came from?

A. No sir.

Q. You hadn't seen them before?

A. No sir.

Q. You don't know whether that is the car that ran over Harry or not?

A. No sir, only what I was told; he said it was the one.

Q. I asked you what you knew?

A. No sir, I don't know.

Q. Well, that car there didn't work good, the lever, did it?

A. Well, it worked.

Q. It didn't work good, did it?

A. I didn't try it myself; I couldn't say.

Q. Couldn't you tell—Didn't you tell Mr. Brown down at the hotel this morning that that lever didn't work good there?

A. No sir, I don't remember telling him that.

Q. Did you have a talk with him this morning at the Whittington?

A. I have talked with him every time I would see him.

287 Q. Refresh your recollection and see if you didn't tell him this morning at the Whittington Hotel, that that lever, while it worked, it didn't work easy?

A. No sir, I don't think so.

Q. Did it work easy?

A. They don't any of them work easy; you have to jerk them.

Q. Did they jerk this one?

A. Yes sir.

Q. They would have to make a hard jerk?

A. Yes sir.

Q. And sometimes it wouldn't open, and they would have to jerk harder? Didn't some of them have to make the second motion to open it?

A. No sir.

Q. It did have to be jerked?

A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. These levers all work by a quick movement?
A. Yes sir.

Recross-examination.

By A. C. Cruce:

Q. Are you a brakeman?
A. Yes sir.
Q. Now, what kind of a coupler was this they had on this car?
A. Latrobe, I believe.
Q. Do they work easy all the time, or sometimes do you have to take your hand to help open it?

Mr. Klienschmidt: That is objected to as irrelevant, incom-
288 petent and immaterial, and improper cross examination.
The Court: Sustained.
Mr. Cruce: We will make him our witness.
Mr. Klienschmidt: I object to them breaking into our case.

Q. I will ask you whether or not these Latrobe car couplers do work easily all the time, open without having to take your hand to help open them up?

Mr. Klienschmidt: I object to that as leading and suggestive; irrelevant, incompetent and immaterial, and not pertaining to any issue in this case, and not confined to the coupler which they allege is defective, but referring to a class in general, and not asked about this coupler.
The Court: Sustained.

(Witness excused.)

Mr. Klienschmidt: We want to offer in evidence defendant's exhibit No. 1.
Defendant's exhibit No. 1, being the application for employment identified by the plaintiff herein, appears in the words and figures following, to-wit:
(A true and correct copy of defendant's exhibit No. 1, appears in this record on page 44 hereof.)
Mr. Klienschmidt: We offer defendant's exhibit No. 3.
Defendant's exhibit No. 3, being a drawing of the Latrobe coupler, appears as follows, to-wit:

(Here follows drawing marked page 288½.)

289 Mr. Klienschmidt: We offer defendant's exhibit No. 2, which is referred to in the answer on page 1 and on page 6, being rules No. 630, 31, 32, 34, 36 and 37.

Defendant's exhibit No. 2 appears in the words and figures following, to-wit:

Precautionery and Personal.

630. All persons entering into or remaining in the service of this company, are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

631. Each employe is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows. Employes of every rank and grade are warned to see for themselves before using them, that the rolling stock, machinery or tools which they are required to use, are in safe condition, or that they are so put before using.

632. The company does not require or expect its employes
290 to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that the shall take time and use the means necessary to, in all cases, do their duty in safety.

634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it dangerous to expose the hands, arms or persons of those engaged in coupling cars, all employes will be expected to use the utmost car- in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

636. It is alike dangerous to assume that signals given to the Engineman or Fireman have been seen, and if seen will be obeyed—when obedience to those signals on the part of the Engineman or Fireman is essential to the safety of an employe in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position—otherwise, without such knowledge, he assumes all risks of danger arising from any misunderstanding or disregard of signals.

637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed, or to go between cars in motion to uncouple them, or to follow other dangerous practices.

291 T. L. HERRING, recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. About this L. & A. they asked you about these cars going down on the L. & A., I believe. How far does the L. & A. run in the state of Arkansas, you remember?
A. About sixty miles, something near that.
Q. Are there stations in Arkansas south of Hope?
A. Yes sir.
Q. You don't know whether these cars, after the L. & A. took them, were going to a station in Arkansas or going to Louisiana?
A. No sir.

Cross-examination by A. C. Cruce:

Q. Is there any way to tell where those cars went to?
A. Yes sir.
Q. How would you tell?
A. You could hunt up the car records of the routing and tell where they were routed, I suppose.

(Witness excused.)
And here the defendant rested its case.

Whereupon, the plaintiff offered and introduced evidence in Rebuttal as follows:

Rebuttal Evidence.

292 FRANK ROBINSON, called as a witness for the plaintiff in rebuttal, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. Frank Robinson.
Q. What is your business?
A. Brakeman.
Q. Who for?
A. The Frisco.
Q. When did you come here? I mean, when did you come to town, with reference to this trial? When were you summoned here as a witness?
A. I came over here the night of the 8th.
Q. Mr. Robinson, where were you on the day that Harry Brown received the injury to his feet?
A. I was in Ashdown.
Q. Where were you at the time of the accident?
A. I was on the engine.
Q. What engine?
A. 804.

Q. Was that the engine that was running the cars that run over him?
A. Yes sir.
Q. Who else was on that engine?
A. Mr. Chamberlain and Mr. Baird.
Q. You mean Engineer Chamberlain?
A. Yes sir.
Q. How long had you been on the engine?
293 A. I don't remember the time; some five or six or ten minutes, I suppose; may be fifteen.
Q. Did you speak to Mr. Chamberlain when you went on?
A. I think so.
Q. Now, Mr. Robinson, where were you just awhile before you went on the engine?
A. I was around there in the yards, around in that part.
Q. Do you know Mr. Godbold?
A. Yes sir.
Q. Did you see him giving signals to Chamberlain there, while that switching was going on?
A. I seen him before I got on the engine, down somewhere about the mill track, down there, give some kind of a signal.
Q. Was it a go ahead or back up signal?
A. I don't remember; I wouldn't be positive what kind of a signal it was.
Q. Which direction was Mr. Chamberlain looking at the time he started his *track* backing when it ran over Harry?
A. He was looking east.
Q. Was that the direction Harry was?
A. Yes sir.

Cross-examination by Mr. Klienschmidt:

Q. On what track were the engine and cars when you saw Godbold give some sort of a signal?
A. I seen Godbold in the space between cars on the passing track; he was over on the mill track there somewhere.
Q. On the mill track?
294 A. Yes, on the track that runs down to the stave factory; it has been so long I don't remember now.
Q. Was that the oil mill track or the stave mill track?
A. Stave mill track.
Q. Was that while this cut of cars were going back on that track?
A. I think it was when they were figuring on backing up, if I remember right.
Q. Figuring on backing up on the stave mill track or the passing track?
A. I don't know which way they were figuring on going; I wasn't interested in the work, and I didn't pay much attention to it.
Q. Now, you say you got on the engine. You got on the fireman's side?
A. Yes sir.

Q. No, lineteen. Were cars, engine and machinery inspected after the accident?
A. That is the one.
Q. And your answer, what is that, the answer?
A. Yes, inspector Jacques; it says by him.
Q. Your answer is inspector Jacques?
A. Yes.
Q. Look at paragraph 11, and see if that doesn't read this way: Give full particulars of cause of accident. State fully. Brakeman Brown stepped in front of car to open knuckle, slipped and fell; wheels passed over his feet. I was not an eye witness? You made that report?
A. Yes sir.
Q. That was a part of your report at the time?
A. Yes sir.

Cross-examination by Mr. Klienschmidt:

Q. Now, with reference to the statement in this report, as to giving full particulars and cause of the accident. You don't know that that is the way the accident happened; that is the way it was told to you?
A. Yes sir.
Q. By whom? By Brown?
A. No, Mr. Brown didn't say that he stepped in front to
299 open the knuckle, but Mr. Godbold and the other brakemen said he was trying to open the knuckle, or crossed over to open the knuckle; that was his idea, in going in front of the car. I didn't get to talk to Mr. Brown as to how it happened, and he didn't say.
Q. It had been raining there that day, hadn't it?

Mr. Cruce: Objected to as leading.

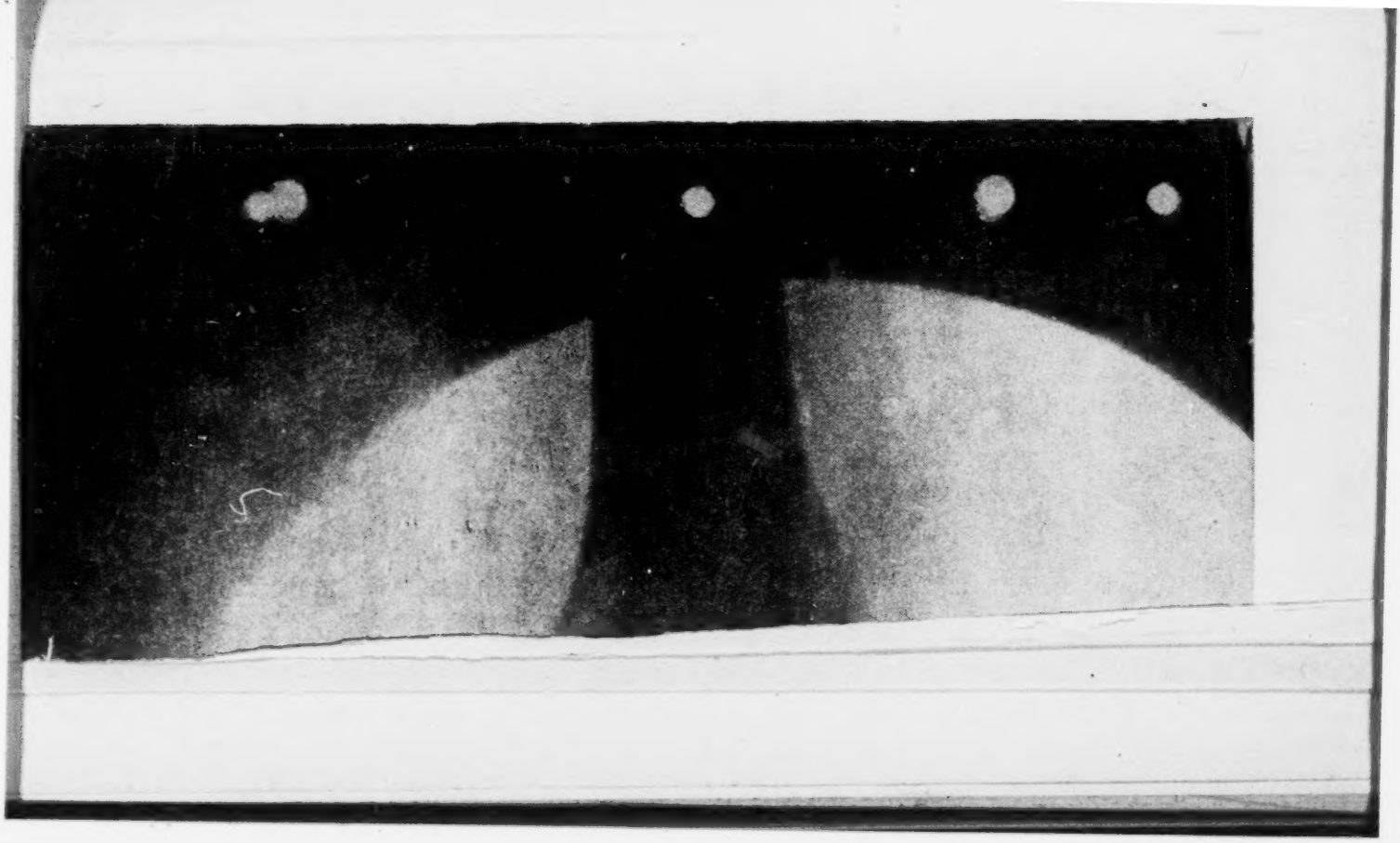
Q. Had it been raining there or not?
A. No, I don't remember it; no, I don't think it had been.

(Witness excused.)

HARRY A. BROWN, recalled as a witness in behalf of the plaintiff, testifie- as follows:

Direct examination by Mr. A. C. Cruce:

Q. Did you have a conversation this morning with this brakeman, Burk, at the Whittington Hotel?
A. Yes sir.
Q. I will ask you if he stated to you that that car coupler was defective?
A. Yes sir. He just made the remark, said it wouldn't work good.
Q. Did you see—What was the name of the witness that came to see you while you were in the hospital at St. Louis?

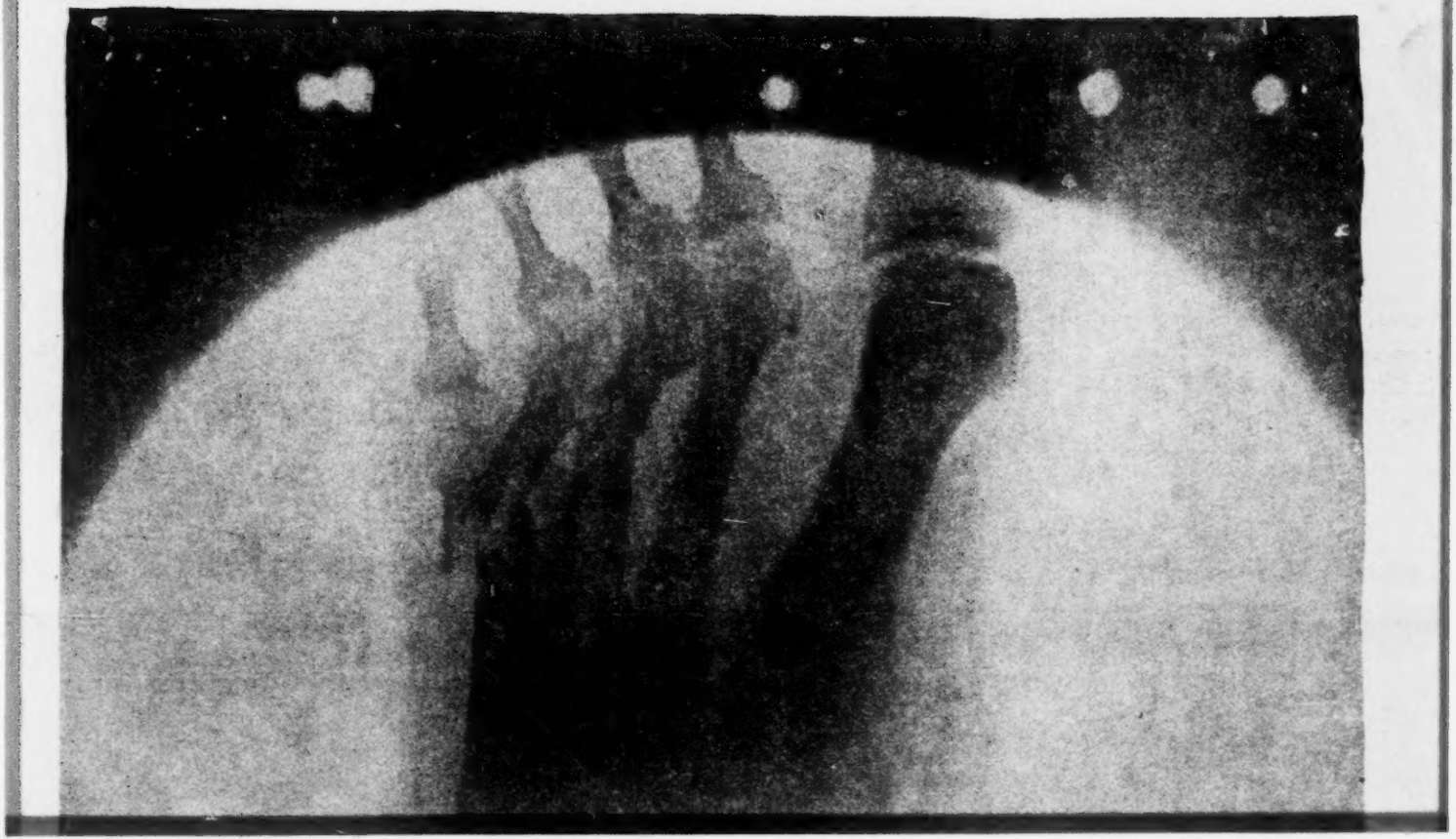


ROAD COMPANY VS.

300a H Or [illegible]

No 399.
St L & SF RR
v
Brown
} 300 a.

Defendants Ex. 5
Page 260



No 399
T. L & S F R R
v.
Brown
} ¢ 300 b.

Defendants Ex 6
Page No.

A. I couldn't recollect his name, or couldn't until I heard it here; I think it is Herring.

Q. How long had you been in the hospital when he was
300 there, do you know?

A. It seems to me about thirty days.

Q. I will ask you if he stated to you there that he had examined that car that hurt you, and it wouldn't work, or was defective?

A. No sir. He made the remark something to the effect like, broke or that it wouldn't fall open on application of the lever.

Cross-examination by Mr. Klienschmidt:

Q. You have been talking to all the witnesses since you have been here in town, haven't you, Mr. Brown, trying to get them to testify in your favor?

A. No sir.

Q. Those the only two you have talked to?

A. I have never talked to Herring since he has been here.

Q. Is Burk the only one you have talked to?

A. Yes sir.

Q. Only one?

A. Yes sir.

(Witness excused.)

And here the plaintiff rested his case in rebuttal.

Mr. Klienschmidt: Here are these exhibits offered before as part of our case, numbers 5 and 6.

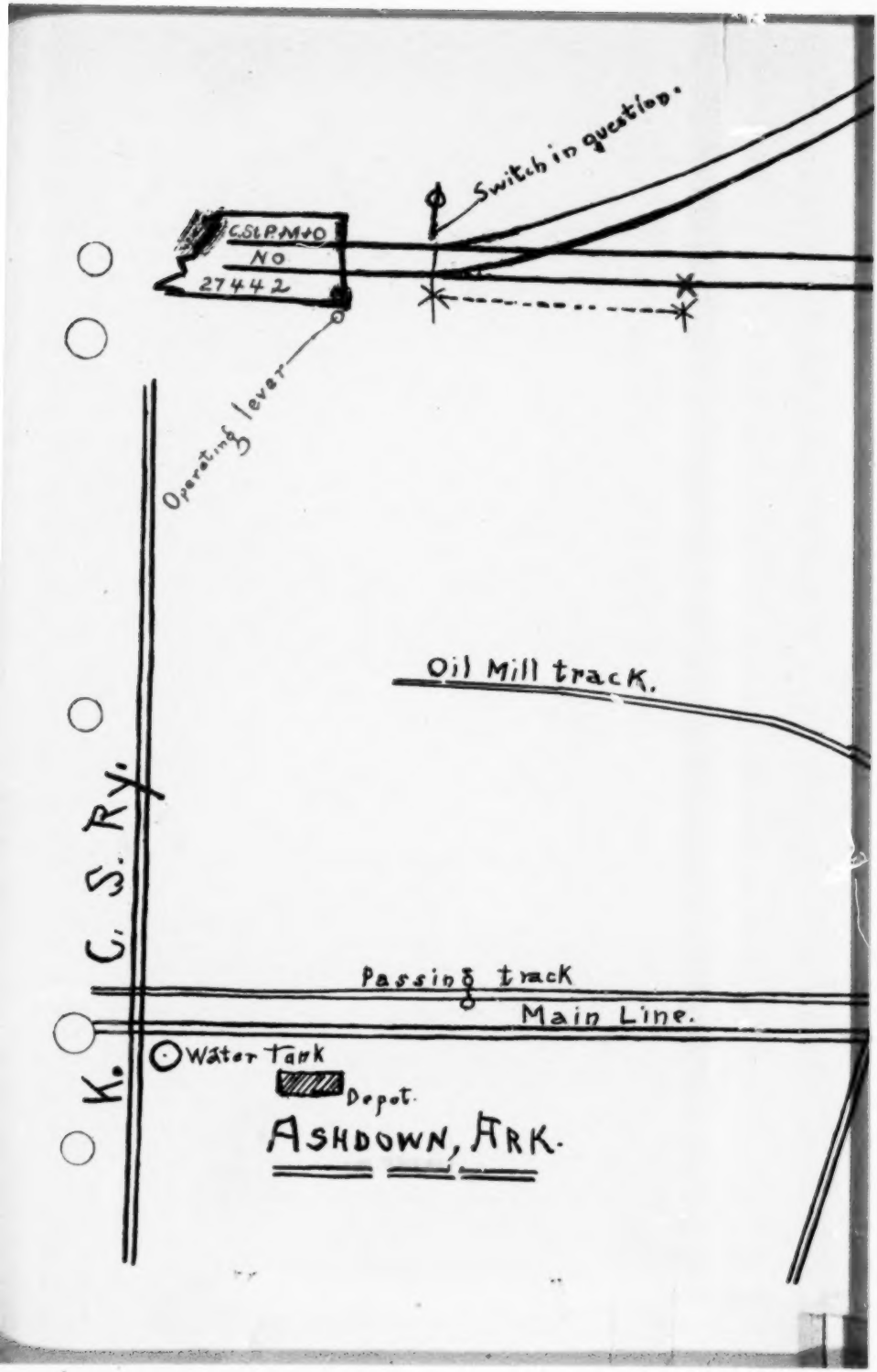
Defendant's exhibit- 5 and 6 are the shadowgraphs of the plaintiff's feet, and are as follows, to-wit:

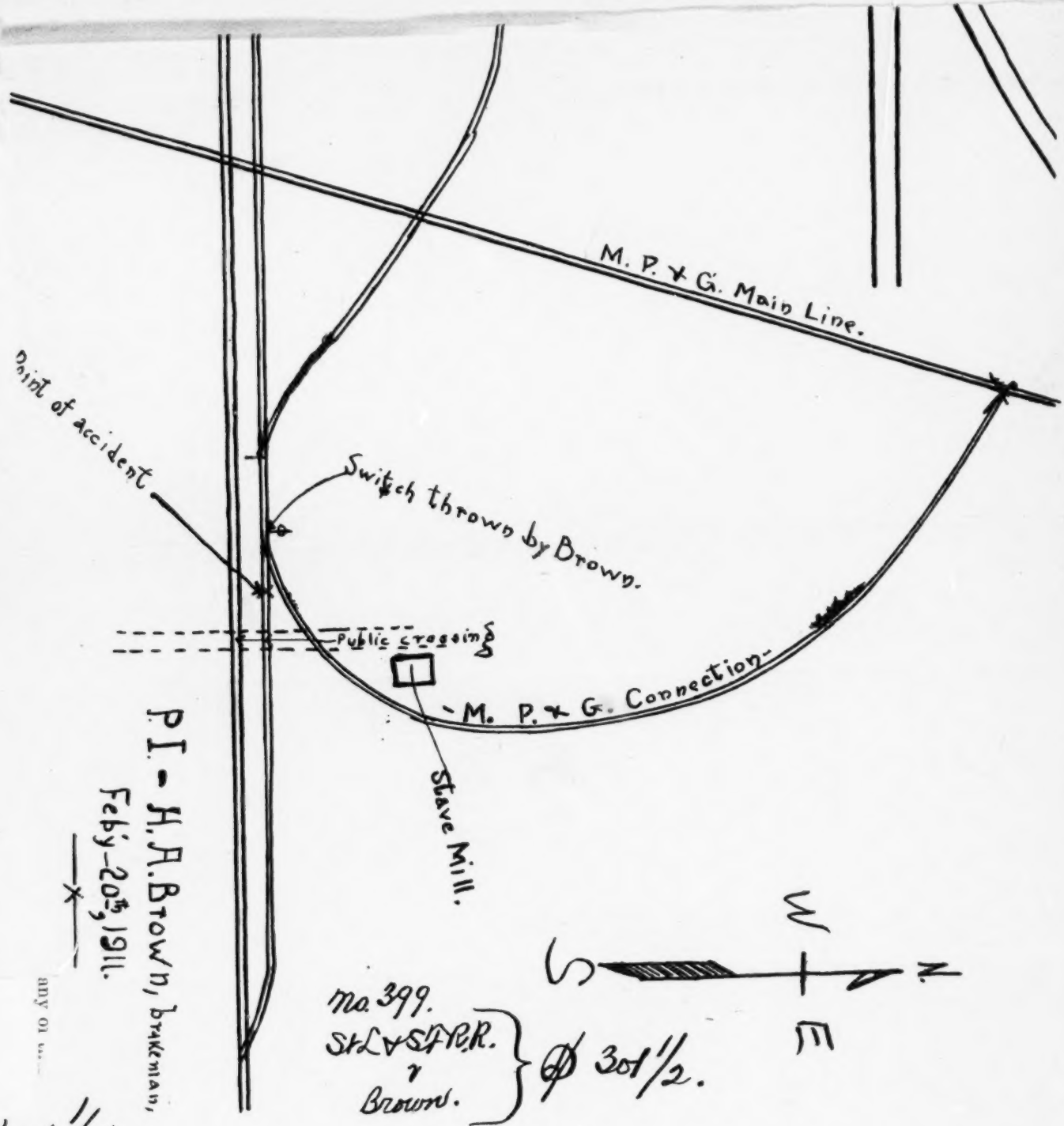
(Here follow photographs marked pages 300*a* and 300*b*.)

301 Mr. Klienschmidt: We offer in evidence plaintiff's exhibit A.

Plaintiff's exhibit A appears in the words and figures, and the drawing as follows, to-wit:

(Here follows drawing marked page 301½.)


Switch in question.
C.S.L.P.M.&O
NO
27442
Operating lever
Oil Mill track.
C. S. Ry.
K.
Passing track
Main Line.
Water Tank
Depot.
ASHDOWN, ARK.



P.I. - H. A. Brown, brakeman,
Feby-20th, 1911.

No. 399.
St L & SF R.R.
v
Brown.

Ø 301/2.

301/2.

302 The Court (speaking to the jury): Gentlemen, it is agreed that you can go to the depot and see some car down there. You go with the bailiff and go right away down there. You will look at the operation of that matter for one purpose, only, and whether it works good or not is nothing to you; you simply go there to see the method of its operation. The object is, not that this car out there will prove to you that the other car complained of was in a good condition or bad condition, but simply to observe the methods that these couplings are made and used for.

And here the plaintiff rested his case.

And here the defendant rested its case.

And thereupon, the usual hour for adjourning for the day, having arrived, Court was adjourned to the 11th day of December, 1912, at 8 o'clock, A. M.

And afterwards, to-wit, on the 11th day of December, 1912, the hearing of this cause was resumed, the appearances being the same as on the 10th day of December, and at which time the following proceedings were had, to-wit:

Mr. W. I. Cruce: If the Court please we would like to re-open the case for the purpose of putting Harry A. Brown back on the stand.

Mr. Klienschmidt: If the Court please, we object to that for the reason that plaintiff announced the case was closed on yesterday afternoon, and relying upon this, the defendant excused *his* witnesses, all of whom are non-residents of the County, and have left the County, and no further evidence should be allowed at this time.

303 The Court: Overruled.

To which action of the Court, the defendant then and there excepted.

HARRY A. BROWN, recalled as a witness on the part of the plaintiff, testified as follows:

Direct examination by W. I. Cruce:

Q. Mr. Brown, on yesterday Mr. Hohnsbeen, I believe it was, testified that he had cautioned you a time or *to* about your carelessness, and that the conductor had once turned you in. Tell the jury whether that is so or not?

A. Mr. Hohnsbeen at no time, only when I stood the examination, never cautioned me, and I was never in the office, and if I was ever turned in, I never knew anything about it.

Q. You heard the testimony of three or four witnesses yesterday who testified, two witnesses who testified that, soon after this accident, or some of them testified before you were taken up off of the ground, and some after you were put in the caboose—you heard their testimony, did you? Testified some you said you slipped; some that you said you were opening the knuckles and slipped and fell. Did you make such statements as that to any of these witnesses?

A. No sir, I don't think I did. I don't see how I could have made them, because it wasn't true.

Q. What was your condition at that time?

A. I was suffering very bad; it was right after I was hurt.

304 Cross-examination by Mr. Klienschmidt:

By Mr. Klienschmidt:

Q. I understand you to say that Mr. Hohnsbeen never gave you any discipline, that is, gave you any caution, or called your attention to any violation of the rules of the company?

A. Yes sir, he did once by letter, but never in his office. He notified me about having one demerit.

Q. When was that?

A. I couldn't remember the day, but I can explain to you what it was for.

Q. Just look at this letter, identified as defendant's exhibit 8, and state if that letter is in your handwriting?

A. Yes sir.

Q. You wrote that, did you?

A. Yes sir.

Q. Read it to the jury, please.

A. Hugo, Oklahoma, 10th month, 6th day——

Q. Of what year?

A. The year isn't on there. Mr. F. D. Hohnsbeen, Assistant Superintendent. Dead Sir: I must express my regrets for running through switch. It is true I might have been excited, but wasn't altogether my fault. However, I will try to keep it from happening again. Respectfully. H. A. Brown.

(Witness excused.)

And here the plaintiff rested his case.

And here the defendant rested its case.

305 And the above and foregoing was all the evidence offered and all the evidence introduced at the trial of said cause.

And afterwards, to-wit, on said 11th day of December, 1912, the defendant filed in said Court its requested instructions, which requested instructions of the defendant appear in the words and figures following, to-wit:

306 & 307 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Request for Instructions.

Comes now said defendant and hereby requests the court to give to the jury the following instructions in writing, numbered from 1 to 28, inclusive.

R. A. KLIENSCHMIDT,
J. H. GRANT,
Attorneys for Defendant.

1.

You are instructed to return a verdict in favor of the defendant.
Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

* * * * * * *

308 6.

You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce.
Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

12.

If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L. p. 66, which is as follows:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe."

The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in pro-

portion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language "in proportion" occurring in this statute. The word proportion is a general word with a number of different meanings.

309 When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words "in proportion" as used in this statute to mean such a part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

But, if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence,

310–316 then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict.

Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

* * * * * * *

317 On the back of said requested instructions appears the following endorsement: Filed in open Court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

318 And the Court, after hearing the instructions numbered 1 2 5 6 12 14 15 16 17 18 19 21 22 23 24 26 and 28, requested by the defendant, and each of said instructions, refused to give said instructions numbered 1, 2, 5, 6, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, and 28, requested by the defendant, or either of said instructions, to which action of the Court in refusing to give said requested instructions numbered 1, 2, 5, 6, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26 and 28, and each of said instructions, separately and collectively, the defendant then and there excepted, and its exceptions were by the Court allowed.

319 And thereupon, at the proper time and in the proper manner, the Court, on its own Motion, delivered its instructions to the jury in this cause, which instructions of the court appear in the words and figures following, to-wit:

320 STATE OF OKLAHOMA,
Carter County:

In District Court.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Instructions of the Court.

I.

Gentlemen of the Jury: Plaintiff alleges that on February 20, 1911, he was employed by the defendant as extra brakeman on a train destined for Hugo, Oklahoma, and that while at the *time* of Ashdown in the state of Arkansas, he sustained certain injuries by the negligence of the defendant and its servants. He alleges that while standing on the track between the rails and while about to arrange the knuckle on the coupler of a car so as to prepare it for coupling with another car, the engineer on the train in question, without warning or notice to plaintiff, backed the engine and cars, throwing plaintiff across the rail and inflicting the injuries complained of. He further alleges that the couplers on both cars which plaintiff was arranging to couple, were defective, in that they would not couple automatically by impact, as required by Act of Congress of March 2, 1893, as extended and amended by Act of Congress of April 22, 1908, and that it was necessary for plaintiff to go in between the ends of the cars and arrange same so that they
321 would couple by impact.

The defendant answers, denying the allegations of plaintiff's petition, and specifically denying that the plaintiff was engaged in operating a train between Hugo, Oklahoma, and Ashdown, Arkansas, and denying that the plaintiff was engaged in the handling of interstate commerce, or that the train in question was engaged in interstate commerce. Defendant furrther denies that the couplers or either of them on the cars in question were defective so that they would not couple automatically by impact, and denies that the cars, or either of the-, were not equipped with couplers and appliances in compliance with the acts of Congress.

For further *defendant*, defendant alleges that it was not necessary for plaintiff to go between the cars to prepare for coupling, and that he was guilty of negligence in so doing, and that he would have sustained no*n* injury if he had been in the exercise of due care. Defendant further alleges that plaintiff violated certain rules promulgated by the defendant for the guidance of the employes, and also violated the

terms of the written contract entered into between the plaintiff and the defendant. It is further alleged that plaintiff assumed the risk of the dangers incident to his employment, and that one of those risks was the danger in making couplings, or in working on or about tracks and trains, and that for this reason, plaintiff is not entitled to recover.

The plaintiff, for reply, denies generally the allegations of defendant's answer, except as to those specifically admitted. Plaintiff admits signing the contract, exhibit "1," but avers that he is not bound by the provisions thereof, and further avers that the defendant has by its acts waived the right to enforce such contract.

322

II.

You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893.

III.

You are instructed that the fact that the defendant is a railroad corporation will not justify you in giving to the testimony of defendant's witnesses any less weight than you would otherwise give to it; and you should not permit any feelings of bias, prejudice or sympathy in any degree to influence your verdict, and your verdict should be based entirely upon the law and the evidence.

IV.

You are instructed that the mere fact that the plaintiff was injured while in the employ of the defendant raises no presumption of negligence on the part of the defendant. The mere happening of an accident to an employe is not sufficient to raise the inference that the employer has failed to discharge his duty to such employe.

V.

You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement of transportation of a car or cars, of freight, destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in the other cars of the train, that was to be transported between interstate points, but plaintiff must show by a fair preponderance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the Act of Congress of April 22, 1908, would apply in this case.

323

If on the other hand, plaintiff has not established that he was so employed in interstate commerce at the time of the injury, then the Act of Congress of April 22, 1908, would not apply in this case.

VI.

You are instructed that by "contributory negligence" is meant the failure or omission of the plaintiff to exercise that degree of care for his safety which an ordinarily prudent man would exercise under the circumstances, and in this connection you are instructed that if you find that the rule or rules set up in defendant's answer were in force at the time of plaintiff's injury, it was the duty of plaintiff to obey the same and, if his injuries were due to or contributed to by his disobedience of said rules, or any of them, that would constitute contributory negligence.

VII.

You are further instructed that if the plaintiff gave the en-
324 gineer on defendant's train a signal to back up, the engineer had a right to obey such signal and had a right to assume that the plaintiff would not be on the track in front of such cars, and it would not be negligence for him to back such car.

VIII.

You are instructed that the fact that the plaintiff, at the time of signing the contract attached to defendant's answer as exhibit "A," did not read same or know the contents thereof, is immaterial and would not relieve the plaintiff from compliance with the terms of said contract.

IX.

The burden of proof is upon the plaintiff in this case to establish by a fair preponderance of the evidence the allegations upon which he relies for a recovery. You are the judges of the weight of the testimony and the credibility of the witnesses, and you should give the testimony introduced such weight as you think it is entitled to receive.

Excepted to by defendant.

S. H. RUSSELL, *Judge.*

X.

If you find by a preponderance of the evidence that at the time of the injury, that the plaintiff was assisting in making up a train for the defendant that was to be taken upon defendant's line of railway from Ashdown, Arkansas to the State of Oklahoma, then in such case the defendant at the time was actually engaging in interstate commerce.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XI.

If you find that at the time of the injury that plaintiff was assisting defendant in making up a train of cars that were to be
325 transported over defendant's line of railway from the said town of Ashdown, Arkansas, and that some of the cars which were being attached to said train were being so attached for the purpose of being transported into other states than the said state of Arkansas, then the defendant at said time was actually engaging in interstate commerce.

Excepted to by Def't.

S. H. RUSSELL, *Judge.*

XII.

If, therefore, you find from a preponderance of the evidence, under the instructions heretofore given you, that at the time of the injury to plaintiff he was assisting the defendant in engaging in interstate commerce, and he received the injuries complained of through the negligence of defendant's engineer, Chamberlain, then plaintiff is entitled to recover and you should return a verdict in his favor. If you find that said injuries were occasioned solely by reason of the negligence of the defendant or its engineer, Chamberlain, you should return a verdict for the amount of damages the plaintiff has suffered.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XIII.

If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

326

XIV.

In this connection you are instructed that contributory negligence, that is, such negligence on part of the plaintiff as would entitle you to reduce the damages he might have suffered, would be a failure upon his part to exercise at the time and place of the injury, such care and caution as a reasonable and prudent man would have exercised under like circumstances.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XV.

Before the plaintiff can be charged with contributory negligence, it must appear that such negligence contributed to his injury.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XVI.

In determining whether or not the plaintiff, at the time of the injury, was guilty of negligence contributing to his own injury, you are instructed that if he was giving the signals which were to govern the movements of the engine that Chamberlain was controlling, and if you further find that immediately before the injury, after the engine and cars attached to it had been drawn upon the passing track, he signaled such engineer to stop the train, and it did stop, and if you further find that after said train came to a stop he gave the engineer a signal not to move such train until further signal from plaintiff, and if at the time he gave such signal the engineer was looking at him and saw said signal, then you are instructed that the plaintiff had a right to assume that the engineer would obey said signal and would not start said cars in motion until he received a further signal from plaintiff.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

327

XVII.

It appears from the evidence that at the time the plaintiff sought employment with the defendant, he signed a stipulation agreeing that if he was injured while in such employ, he would, within thirty days after such injury, give to the defendant notice in writing of the circumstances attending such injury, the nature and character of the same, and his claim for damages. You are instructed that such agreement was binding upon the plaintiff, and in this connection, you are told that if, within thirty days after the injury, he did make a statement in writing to one of the officers of the defendant mentioned in such agreement, and that the defendant accepted the statement so offered as a compliance with the provisions of such agreement, then you are instructed that such stipulation would not bar the right of the plaintiff to recover.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XVIII.

You are instructed that by accepting employment as a brakesman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are

ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant.

Excepted to by defendant.

S. H. RUSSELL, *Judge.*

XIX.

Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance
328 in reaching a verdict, but whatever verdict is re-dered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the 12, agree on a verdict, you will simply sign it by your foreman and return it into court.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XX.

If you find for the plaintiff in this case, you should take into consideration in estimating his damages the pain and suffering he has undergone, the pain and suffering he is liable to undergo in the future, if any, the question whether or not his injuries are permanent or of a temporary character, his ability or lack of ability to labor and earn money in the future, the ability he possessed at the time of the injury to labor and earn money, and give him such damages as will entirely compensate him in accord with the instructions herein for all the injuries he has suffered, not exceeding the amount claimed in plaintiff's petition, and in determining this, you are also authorized to take into consideration his age, his expectancy of life and the wages he was earning at the time of his injury.

Excepted to by Def't.

S. H. RUSSELL, *Judge.*

S. H. RUSSELL, *Judge.*

On the back of said instructions appears the following endorsement: Filed in open court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

329 And thereupon, counsel for plaintiff and defendant argued said cause to the jury, and thereafter, to-wit, at the conclusion of said argument, the jury retired, having been placed in charge of a sworn bailiff, to consider of their verdict, and afterwards, to-wit, on said 11th day of December, the jury returned into Court a verdict, finding in favor of the plaintiff and against the defendant, which verdict of the jury appears in the words and figures following, to-wit:

330 STATE OF OKLAHOMA,
Carter County:

In District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Verdict.

We, the jury impaneled and sworn in the above entitled cause, do upon our oaths, find for the plaintiff and fix the amount of his recovery at $16,900., Sixteen thousand & nine Hundred Dollars.

I. R. BEST.
E. T. FOSTER.
W. L. HIGNIGHT.
J. R. HUNT.
W. J. BUTLER.
C. W. PETTY.
A. V. DOAK.
P. J. JONES.
O. A. JUHAN.

On the back of said verdict appears the following endorsement: Filed in open court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

331 The journal entry of the judgment of the court as rendered on the verdict of the jury in this cause, appears in the words and figures following, to-wit:

332 In the District Court within and for Carter County, Oklahoma.

Number 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Journal Entry of Judgment.

Now on this 11th day of December, 1912, came the plaintiff herein, by his Attorneys, Stuart, Cruce & Gilbert, Cruce & Potter and L. S. Dolman, and in person, and also came the defendant by its Attorneys, R. A. Klienschmidt and J. H. Grant, and this cause came on for trial in its regular order, before a jury of twelve good

men, good and lawful citizens of Carter County, Oklahoma, who being duly empaneled and sworn to well and truly try the issues joined in said cause, according to the law and the evidence, and having heard the evidence, the charges of the Court and the argument of counsel, returned the following verdict, to-wit:

STATE OF OKLAHOMA,
Carter County:

In District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Verdict.

333 We, the jury impaneled and sworn in the above entitled cause, do upon our oaths, find for the plaintiff and fix the amount of his recovery at $16,900. Sixteen thousand nine Hundred Dollars.

I. R. BEST.
E. T. FOSTER.
W. L. HIGNIGHT.
J. R. HUNT.
W. J. BUTLER.
C. W. PETTY.
A. V. DOAK.
P. J. JONES.
O. A. JUHAN.

It is therefore considered, ordered and adjudged by the Court that the Plaintiff, Harry A. Brown, do have and recover of and from the defendant, the St. Louis & San Francisco Railroad Company, the sum of sixteen thousand nine hundred ($16,900.00), this judgment to bear interest from this date at the rate of six per cent per annum until paid, together with all costs of this action, for all of which let execution issue. To which entry of judgment the def't excepts.

S. H. RUSSELL, *Judge.*

On the back of said journal entry appears the following endorsement: Filed in open court Dec. 14, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

334 And afterwards, to-wit, on the 14th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said Court, and within three days after the verdict rendered herein, the defendant in said cause filed in said court

its motion for a new trial, which motion appears in the words and figures following, to-wit:

335 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation,
Defendant.

Motion for New Trial.

Comes now said defendant and moves the court to vacate and set aside the verdict and judgment rendered herein on the 11th day of December, 1912, and to grant said defendant a new trial for the following causes, which affect materially the substantial rights of said defendant:

I.

Irregularity in the proceedings of the court, jury and plaintiff, and abuse of discretion by which defendant was prevented from having a fair trial.

II.

Misconduct of the jury and the plaintiff.

III.

The verdict of the jury is not sustained by sufficient evidence and is contrary to law.

336 IV.

Error of law occurring at the trial and duly excepted to by the defendant.

V.

The court erred in denying defendant lease to file amendment to its answer, setting up the adjudication of the plaintiff as a bankrupt.

VI.

The court erred in refusing to substitute the trustee in bankruptcy in charge of the bankrupt estate of said plaintiff, as party plaintiff in this case.

VII.

The court erred in permitting and allowing plaintiff to maintain this action in his own name.

VIII.

The court erred in refusing to sustain the motion of defendant for judgment on the pleadings.

IX.

The Court erred in refusing to require the plaintiff to elect whether he would proceed in this cause under the Act of Congress of April 22, 1908, as amended, known as the Employers' Liability Act, or under the Constitution and laws of the state of Oklahoma.

X.

The court erred in admitting incompetent, irrelevant and immaterial testimony, over the objection of the defendant.

XI.

The Court erred in overruling the demurrer of the defend-
337 ant to the evidence of plaintiff.

XII.

The court erred in excluding and refusing to admit certain competent, material and relevant testimony offered by the defendant.

XIII.

The court erred in refusing to instruct the jury to return a verdict for the defendant.

XIV.

The court erred in permitting the plaintiff to reopen his case after both parties had finally rested and the witnesses had been excused.

XV.

The Court erred in his instructions to the jury and each of them.

XVI.

The court erred in giving to the jury instructions numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, and each of them.

XVII.

The court erred in refusing to give to the jury the several instructions requested by the defendant, and each of them.

XVIII.

The court erred in receiving a verdict signed or agreed to by less than twelve jurors.

XIX.

The verdict of the jury is excessive, appearing to have been
338 given under the influence of passion and prejudice.

XX.

The court erred in permitting counsel for plaintiff to make improper and prejudicial argument and statements to the jury and in not withdrawing said statements and admonishing counsel with reference thereto.

21.

The jury erred in improperly arriving at their verdict by lot.

R. A. KLIENSCHMIDT,
J. H. GRANT,
HARRELD, WARD & HUTCHISON,
Attorneys for Defendant.

On the back of said motion appears the following endorsement: Filed in open court Dec. 14, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

339 And afterwards, to-wit, on the 28th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said Court, this cause came on for hearing before the Honorable S. H. Russell, Judge of said Court, on the motion of the defendant for a new trial, the plaintiff appearing by his attorneys, A. C. Cruce, W. I. Cruce and L. S. Dolman, and the defendant appearing by its attorney, J. H. Grant, whereupon the following proceedings were had and the following evidence was offered and introduced in the order following, to-wit:

Mr. A. C. Cruce: We object to the introduction of any testimony, because it is irrelevant, incompetent and immaterial.

The Court: The motion is overruled.

I. R. BEST, called as a witness by the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Grant:

Q. Please state your name to the Court.
A. I. R. Best.
Q. You live in this city, do you, Mr. Best?
A. Yes sir.
Q. I will ask you to state whether or not you were a member of the jury in the case of Harry A. Brown against the St. Louis &

San Francisco Railroad Company, number 1402, in which a
340 verdict was rendered on the 11th day of December, 1911, for the plaintiff?

A. I was.

Q. I will ask you to state whether or not you were foreman of that jury?

A. I was.

Q. Mr. Best, I will ask you to state whether or not a vote was taken as to whether or not the plaintiff or defendant should recover in this case, when the jury reached the jury room?

A. Not just then, Captain Grant.

Q. I am not speaking now of the amount, but I am asking you whether or not there was a vote to ascertain which party should recover, if either?

A. There was during our deliberations, yes sir.

Q. That was taken before you discussed the measure of damages, was it, as to which party should recover?

A. Yes sir.

Q. In voting on that, what method was used to determine what amount the plaintiff should recover?

A. You want me to state our deliberations there?

Mr. Cruce: Objected to as incompetent, irrelevant and immaterial.

The Court: I will let him answer.

Q. Having reached a conclusion that the plaintiff should recover, then what method did you adopt to find the amount?

A. The question was put to each man who was a member of that jury the amount. This one said so muc-; this one so
341 much and this one so much and so, on around, until we passed to the twelve, each man stating the amount that he thought he ought to recover.

Q. Who asked that? You as foreman?

A. Yes sir.

Q. Al- right, go ahead.

A. And after the question had gone around, and I had put the amounts of each man on the paper—I wasn't asked to do that, but I just wanted to see how the jury stood on it; and after we got through, some member of the jury asked me if I was making a notation of the amount each one stated that should be recovered. I said yes. He asked me to state what it aggregated. I summed it up and it aggregated $16,900.00.

Q. You mean the total sums added together gave you $16,900.00?

A. The total sums added together and divided by twelve.

Q. The total amounts added up and divided by twelve made after the division——

A. $16,900.00.

Q. That was the amount of the verdict returned, was $16,900.00?

A. Yes sir.

Cross-examination by A. C. Cruce:

Q. I believe you said, Mr. Best, that after you got out there, you first all discussed as to which should recover and decided that the boy was entitled to recover?

A. Yes sir, Mr. Cruce, the first question——

342 The Court: He means, was that decided in advance of the other proposition?

A. Yes sir.

Q. Then, after you decided that the plaintiff was entitled to recover, you asked each man how much he thought he ought to recover?

A. Yes sir.

Q. And those amounts varied?

A. Yes sir.

Q. Do you remember the amounts they varied from? That is immaterial. At any rate, you set down each amount, one under the other. You hadn't been requested to do that?

A. No sir.

Q. There had been no agreement among the jury that you should do that?

A. No sir.

Q. But after you got it down, someone suggested that you add it up?

A. Yes sir.

Q. You did and divided that by twelve?

A. Yes sir.

Q. And that gave you $16,900.00?

A. Yes sir.

Q. Did you all mutually agree then that that was the verdict?

A. No sir.

Q. How long after that was it before you arrived at a verdict?

Mr. Grant: We object to that as incompetent, irrelevant
343 and immaterial.

The Court: Let him answer.

To which action of the Court, the defendant then and there excepted.

A. It was quite a bit.

Q. Three-quarters of an hour or an hour?

A. I don't know; I expect so.

Q. And finally nine of the jurors signed the verdict, agreeing on this $16,900.00?

A. Yes sir.

Redirect examination by Mr. Grant:

Q. You were trying all the time to get the other three to agree to that proposition, weren't you, Mr. Best?

A. Yes, we were trying that, and each one was discussing the amount, some that it was too high and some thought it was too low.

Q. But the main effort was to get these other three jurors to agree to that amount of $16,900.00, wasn't it?
A. Yes.

Recross-examination by A. C. Cruce:

Q. You took several ballots on different amounts after you had added this up and divided it, didn't you?
A. Yes sir.

By the Court:

Q. Did you read the Court's instructions, that you must not cast lots or resort to any other method or means of chance
344 in arriving at your verdict?
A. We didn't intend to cast lots.

Mr. Grant: We object to what the witness intended.
Mr. Cruce: We suggest that there isn't an element of lot in this.

A. We discussed that.

(Witness excused.)

J. D. TANNER, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Grant:

Mr. Cruce: Same objection to this witness testifying as to the other.
The Court: Overruled.
To which action of the court, the plaintiff then and there excepted.

Q. You were a member of the jury in the case of Harry Brown against the Frisco, No. 1402, tried in this court on December 11th, were you, Mr. Tanner?
A. Yes sir.
Q. You have just heard the testimony of Mr. Best as to how the amount of that verdict was arrived at. I wish you would please state your recollection.
A. Mr. Best told it just like it was.
Q. The statements with reference to the manner in which it was arrived at as stated by Mr. Best are true, as you remember them?
A. Yes sir.

345 Cross-examination by A. C. Cruce:

Q. Do you remember how many ballots you took, Mr. Tanner, after you had added up and divided?
A. We took a number, quite a number; I don't know how many.
Q. Nothing was said before the addition was made that you were going to abide by the result?
A. No sir, no agreement to that, because we never did all agree to that.

Redirect examination by Mr. Grant:

Q. I will ask you if it isn't a fact that you began voting on the highest amount submitted by any juror and then voted on the amounts between that and the $16,900.00?
A. I couldn't tell you just every amount we voted on.
Q. Wasn't that the method used, Mr. Tanner?
A. I don't remember that it was.
Q. Didn't you begin at the highest amount submitted by any juror and vote on that first?
A. I don't remember.
Q. And then didn't you drop down from that sum to other sums between that and $16,900.00?
A. I don't remember.
Q. Did you vote for any sum less than $16,900.00?
A. Yes sir.
Q. Wait until I get my question through—on any sum less than that before the nine signed the verdict for $16,900.00?
A. Yes, sir.

346 The Court: I would like to ask this witness a question.

By the Court:

Q. All twelve of these men had given out the amounts they desired, you say?
A. Yes sir.
Q. Three of them refused to abide by that result?
A. Yes sir.
Q. Did those three have separate amounts among themselves, or did the three agree on one amount?
A. No sir, they had separate amounts.

(Witness excused.)

I. R. Best, re-called as a witness for the defendant, testified as follows:

Direct examination by Mr. Grant:

Q. After you had made the addition of the sums stated by each juror, and after you had divided that and obtained the sum of $16,900.00, I will ask you if you didn't then submit to the jury to be voted upon, as foreman, the amounts—the amount—the largest amount submitted by any juror?
A. You mean by that each juror's amount?
Q. Now, I mean the highest amount submitted by any juror as being the sum which he was in favor of returning in favor of the plaintiff?
A. I don't think so.
Q. What was the sum voted on first after that division was
347 made?
A. If I remember correctly, there was never a larger sum voted on that the $16,900.00. Before the contention of the jury

seemed to be it should be less and there never was an amount granted than the $16,900.00 voted on, if I remember correctly. It was discussed, however, but I don't think it was voted on.

By the Court:

Q. Did you have any agreement among that jury to abide by that result, after you had added it up and divided it?

Mr. Grant: We object to that as immaterial.

The Court: Overruled.

To which action of the Court, the defendant, then and there excepted.

A. No sir.

(Witness excused.)

Mr. A. C. Cruce: I want charge V of the Court's instructions in this case to show that it was requested by the defendant.

And thereupon the Court, after hearing the motion for new trial, the testimony as introduced on said motion, the argument of counsel, and being sufficiently advised in the premises, overruled said motion. To which action of the Court, the defendant then and there excepted, and prayed an appeal to the Supreme Court of Oklahoma, which was granted, and the defendant was allowed ninety days' extension of time in which to prepare and serve case-made, the plaintiff ten days thereafter in which to suggest amendments, the case-made to
348 be signed and settled thereafter, on five days' notice in writing by either party. The Court further ordered that execution be stayed, pending appeal, for thirty days, in order to permit the defendant to execute and file supersedeas bond in the sum of $35,000.00. To which action of the Court, in staying the execution, the plaintiff then and there excepted.

The journal entry of the judgment of the court appears in the words and figures following, to-wit:

349 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Journal Entry.

Now on this 28th day of December, 1912, the same being a judicial day of the regular — term of this Court, the above entitled and numbered cause came on to be heard upon motion of defendant for

a new trial, both parties being represented by counsel, and after hearing evidence introduced in support of the motion and the arguments thereon, and being fully advised in the premises, the court is of the opinion that said motion should be overruled.

It is therefore ordered, adjudged and decreed that said motion be and the same is hereby overruled, to which ruling of the court the defendant excepts, and the exception is allowed.

For good cause shown, the time for making and serving case-made is extended, and the defendant is allowed ninety (90) days from this date within which to make and serve case-made for the
350–357 supreme court. The plaintiff is allowed ten (10) days thereafter in which to suggest amendments, the said case made to be settled and signed upon five (5) days' notice in writing by either party.

It is further ordered that execution be stayed for thirty (30) days from this date, pending appeal to the supreme Court upon the defendant making and executing a supersedeas bond, conditioned as required by law, with good and sufficient surety, in the sum of $35,000.00, to be approved by the clerk of this court.

S. A. RUSSELL, *Judge.*

On the back of said journal entry appears the following endorsement: Filed in open court Dec. 28 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

* * * * * * *

358 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made and all rulings and orders made herein, all exceptions taken by the defendant to such rulings and orders; all the evidence offered and introduced upon the trial of the case and all exceptions taken by the defendant to the admission or exclusion of such evidence; all instructions and declarations of law given by the court and exceptions by the defendant thereto; all instructions or declarations of law asked by the defendant and refused by the court and exceptions of defendant thereto; the judgment of the court and the exceptions of the defendant thereto; the verdict of the jury rendered therein; and the same is a true and correct statement and a complete transcript of all the pleadings, motions, findings, evidence, judgments and all proceedings in said case.

359 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

To Harry A. Brown, the Above-named Plaintiff, and Stuart, Cruce & Gilbert, Cruce & Potter, and L. S. Dolman, His Attorneys of Record:

Toe above and foregoing case-made is hereby tendered to and served upon you and each of you as a true and correct case-made in the above entitled cause and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause.

R. A. KLEINSCHMIDT,
J. H. GRANT,
HARRELD, WARD & HUTCHINSON,
Attorneys for Defendant.

Acknowledgment.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made, this the 11 day of March, 1913.

STUART, CRUCE & GILBERT,
Attorneys for Plaintiff.

360–362 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

We, the undersigned, attorneys of record for the plaintiff in the above entitled cause, do hereby waive notice to us of the time and place of the presentation of the above and foregoing case-made to the judge of said district court before whom said cause was tried for settlement and signing, and hereby agree that said case-made may be presented to said judge for settlement and signing and be settled, signed and allowed by said judge at any time when it may suit his convenience to do so.

We further waive the issuance of a summons in error out of the Supreme Court of the State of Oklahoma, and hereby agree that we

may be entered as attorneys of record for the above named plaintiff in said Court in this cause.

STUART, CRUCE & GILBERT,
Attorneys for Plaintiff.

Mar. 19, 1913.

Filed Jun- 11 1913. W. H. L. Campbell, Clerk.

* * * * * * *

363 In the District Court of Carter County, Oklahom...

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Be it remembered, That on the 26th day of March, 1913, at the court house in the city of Ardmore, county of Carter, state of Oklahoma, the above and foregoing case-made was presented to me, Stilwell H. Russell, Judge of said district court of said county, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law by Harreld & Ward, attorneys for defendant; and it appearing to me that said case-made has been duly made and served upon the plaintiff within the time fixed by the order of this court, and in the time and in the manner and form provided by law; and it further appearing that said plaintiff, by his attorneys of record, Cruce, Stuart, & Gilbert, Cruce & Potter, and L. S. Dolman, has waived notice of the time and place of the presentation of said case-made to me as Judge of said district court for settlement, and have waived their presence at the time said case-made is to be settled and signed, and have agreed that same may be settled and signed at any time; and it appearing furtner that said
364–367 plaintiff has waived the suggestion of amendments to said case-made, and the court being fully advised in the premises, and the said case-made having been examined by me, is true and correct and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments, and proceedings in said cause, I now hereby allow, certify, sign and settle the same as a true and correct case-made in said cause, and hereby order that the clerk of said court attest the same with his name and the seal of said court, and file the same of record as provided by law.

Witness my hand, this 26th day of March, 1913.

S. H. RUSSELL,
Judge of the District Court of Carter County, Oklahoma.

Attest:
[SEAL.] S. F. HAYNIE,
Clerk of the District Court of Carter County, Oklahoma.

Filed Mar. 26 1913. S. F. Haynie, Clerk District Court Carter County, Oklahoma.

* * * * * * *

368 Thereafter, at the April, 1914 Term of said Court, on the 21st day of April, 1914, the following proceeding was had in said cause, to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

(Justice Russell announces his disqualification to sit during the hearing and final determination of this cause, having presided as Judge of the District Court in the trial of the case.)

And now on this day the above cause is argued orally and the cause is submitted, and it is ordered by the court that plaintiff in error be allowed 15 days to file supplemental and reply brief.

369 And afterward, at the July, 1914, Term of said Court, on the 22nd day of September, 1914, the following proceeding was had in said cause to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Riddle, J. All the Justices concur, except Kane, C. J. not participating.

370 Filed Sept. 22, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Syllabus.

1. The facts examined and found not to bring the case within the definition of a quotient verdict or verdict by lot.

2. Upon grounds of public policy, the jurors will not be heard, by affidavit, deposition or other sworn statement, to impeach or explain their verdict by showing on what ground it was rendered, or that they made a mistake, misunderstood the law, or the result of their finding. The question as to whether or not evidence of jurors will be received to prove overt acts, resulting in an irregular or an unauthorized verdict is not involved, and the point is not decided.

3. Under all the facts and circumstances, the question of defendant's negligence was an issue for the jury. The jury having found in favor of plaintiff, and its finding has been approved by the trial court, the same will not be disturbed by this court.

4. There was sufficient evidence to carry the case to the jury; and the court did not err in overruling defendant's demurrer to the evidence and in denying its motion for a directed verdict.

5. The Seventh Amendment to the Constitution of the United States has no application to trials in state courts. The state has a right to regulate trials in its own courts, in its own way.

6. Instructions of the court examined and held to fairly cover the issues made by the pleadings and the evidence, and no error affecting a substantial right was committed in the court's instructions.

7. Defendant requested certain special instructions be given to the jury, which were refused, held: The court had fairly submitted to the jury the law applicable to the issues, and no error was committed in the action of the court in this regard.

8. The facts show that both of plaintiff's feet were crushed; that his right foot was crushed in the instep and his toes were broken so the bones protruded through the flesh, causing same to become permanently drawn out of shape; that the muscles and tendons of said foot are permanently injured, so plaintiff can never have full and free use of same; that his left foot was bruised and maimed so that a large portion of the bones of his ankle and foot were splintered and mashed, and it was necessary to remove same; that his injuries are permanent, which require him to use crutches, in order to walk; that he suffered a great deal of pain, and was under care of physicians for several months. Held: That a verdict for $16,900 is not excessive.

Error from the District Court of Carter County.

S. H. Russell, Trial Judge.

Affirmed.

371 W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, Attorneys for Plaintiff in error.
Stuart, Cruce & Cruce, Attorneys for Defendant in error.

Opinion of the court by

RIDDLE, *J.*:

This proceeding is prosecuted from a judgment of the district court of Carter County. The parties will be referred to as they were in the trial court.

The plaintiff in his petition, avers in substance that he is a resident of the State of Oklahoma, and that the defendant is a common carrier, engaged in the operation of a line of railway, and in interstate commerce between the town of Hugo, in the State of Oklahoma, and through the town of Ashdown to the town of Hope, in the State of Arkansas; that on the 20th day of February, 1911, while engaged in cutting out and taking on cars in the town of Ashdown, Arkansas, in making up a regular train destined for Hugo, Oklahoma, plaintiff was permanently injured through the carelessness and negligence of one Tom Chamberlain, engineer, engaged in making up said train; that while assisting in switching and cutting out said cars in making up said train, as his duty and as he was ordered, he signaled said engineer to stop and wait until he could throw the switch and arrange the knuckle on the end car, so that it would couple on to the main train standing on the passing track; that said engineer had stopped the train and plaintiff had thrown the switch and stepped in between the rails and between the ties to fix the knuckle on the coupler, as was his duty to do, said engineer, disobeying plaintiff's signal to wait, and without warning or notice to plaintiff, with great force, carelessly and negligently put said engine in motion and backed said cars upon plaintiff so suddenly and unexpectedly as to make it impossible for plaintiff to escape, and plaintiff was thrown violently across said rail, and both of his feet were crushed and maimed so that he
372 sustained permanent injuries; that said plaintiff's right foot was crushed in the instep and toes and the bones broken therein so that same protruded through the flesh, causing said foot to become permanently drawn out of shape; that said muscles and tendons of said foot were permanently injured, bruised and strained so that plaintiff could never have full and free use of same; that plaintiff's left foot was bruised and maimed so that a large portion of the bones of the ankle and foot were splintered and mashed so that it became necessary to remove the same, thereby crippling the plaintiff and causing him to use crutches in order to walk, and that by reason of said injuries, plaintiff suffered great mental pain and

anguish, and has been ever since said injury under constant care of physicians and surgeons. Plaintiff further alleges that it became and was his duty to so arrange the knuckle at the ends of the cars that the same would couple by impact, and while the cars on the mill track were being pulled out upon the passing track, he crossed over to the end car of the train, left standing on the passing track to open the knuckle thereon, but that the same was so defective that plaintiff was unable to open the same. The plaintiff then signaled the engineer, as aforesaid, to stop and wait while he opened the knuckle upon the rear car attached to said engine; that said knuckle was so defective that it stuck and refused to open, and that it was while so engaged that plaintiff was injured, as herein alleged, while he was in the exercise of due care and without fault or negligence on his part; that both of said cars were used by said defendant in interstate commerce and had couplers so defective that they would not couple by impact, as required by Act of Congress of March 2nd, 1893, and as amended by the Act of April 22nd, 1908 That by reason of such injuries, he sustained damages in the sum of $35,000, and prays judgment.

373 The defendant denied generally and specially all and singular every allegation in said petition, except such as were specifically admitted. It alleged that said train was a local, operating wholly within the State of Arkansas between Hope and Ashdown, and denies that either of said cars were so defective or that they were equipped with defective couplers, as alleged. It averred that said cars and each of them were properly equipped with operating levers by which the knuckles and couplers on said cars could be prepared for coupling by impact while standing outside of the track and without going between the said cars, and denies that the injuries, if any, received by plaintiff, were caused in any manner by the negligence of the defendant and alleges that if said injuries were contributed to by any act of negligence, save his own, that it was the negligence of a fellow-servant or fellow servants of the plaintiff, for which the defendant would not be liable. Defendant specifically alleges that the injuries received were due to and directly contributed to by the negligence of plaintiff.

The plaintiff filed a reply, denying all and singular the allegations of new matter in the answer, and making certain affirmative allegations, not necessary to be set out at length.

Defendant, in its petition in error, assigns twenty-two errors, but only discusses the following: (2) Misconduct of the jury, whereby defendant was prevented from having a fair trial. (3) The verdict of the jury is not sustained by sufficient evidence. (4) Errors of law occurring at the trial and duly excepted to by defendant. (11) The court erred in overruling the demurrer of defendant to the evidence of plaintiff. (13) The court erred in refusing to instruct the jury to return a verdict in favor of the defendant. (15) The court erred in his instructions to the jury and specifically in giving

374 to the jury instructions Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, inclusive, and in giving each of said

instructions. (16) The court erred in refusing to give to the jury the several instructions requested by defendant, and in refusing to give each of said instructions, as requested. (17) Said court erred in receiving a verdict signed or agreed to by less than twelve jurors. (18) The verdict of the jury is excessive, appearing to have been given under the influence of passion or prejudice. (22) The court erred in overruling the defendant's motion for a new trial.

We will consider the various assignments relied upon in the order in which they are presented in counsel's brief, except we will group and dispose of the 3rd, 4th, 11th and 13th together, as they involve principally one proposition of law, and are controlled practically by the same state of facts. It is sufficient to say that the plaintiff's testimony substantially sustains the allegations in his petition, as set out.

Under the first assignment presented by counsel, "misconduct of the jury" it is contended that it is shown from the testimony of two of the jurors that the amount of the verdict was arrived at by aggregation and average, and is what is denominated a "quotient verdict." It is not only the contention of the defendant's counsel that they have a right to show irregularity in the proceedings of the jury, resulting in an irregular verdict, but that by the testimony of two of the jurors, they have actually shown that this verdict was the result of a lot or chance; hence, it is contrary to law. It is the contention of plaintiff's counsel, however, (1) that the testimony fails to show that the verdict is the result of a chance or lot, or a quotient verdict; and, (2), that under the rule laid down by this court, testi-
375 mony of jurors will not be received for the purpose of impeaching their verdict. We have carefully read the testimony of the two jurors, and are of the opinion that it fails to show that this verdict is the result of chance or lot; nor is it a quotient verdict. In substance, the testimony of the jurors shows that after they had agreed that the plaintiff should recover, at the request of the foreman, each juror stated the amount which in his judgment the plaintiff should recover. Without an agreement to do so, someone suggested to the foreman to add the various amounts together and divide it by twelve, which was done, and the result was $16,900. The testimony of each of the jurors, however, shows that after this was done, there were several votes taken on the question as to the amount the plaintiff should recover; and, finally, nine of the jurors concurred in the verdict for $16,900. A quotient verdict is defined to be "a verdict where each juror marks down an amount, then the amount thus marked down, being added together, the sum is divided by the number of jurors and the result rendered as their verdict." This must be done as the result of an agreement in advance to make it their verdict. The facts do not show that the verdict in question is a quotient verdict. 29 Cyc. 812, under the head of New Trials, treats this subject as follows:

"A verdict will not be set aside merely because the amount thereof was the result of a compromise between jurors, nor because the amount was first found by adding together the amounts the several jurors thought should be given and dividing the sum by twelve, if

there was no agreement in advance to return a verdict for the quotient so found."

There are cases from California, Colorado, Delaware, Illinois, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, Texas, Utah, Michigan, Wisconsin, and from the Federal courts cited in support of the text.

In the cases of City of Kinsley vs. Morse, 40 Kan. 588, it is stated in the syllabus:

376 "Where a jury are deliberating upon what their verdict shall be, and during such deliberation a ballot is taken by which it is ascertained that all of the jurors are in favor of the plaintiff, and thereupon each juror marks on a slip of paper the amount he believes the verdict should be, and such marking shows the lowest to be $3,000 and the highest $5,000, and it is then proposed by a part of the jury to aggregate such sums and divide by twelve, which is done, and the quotient is found to be $4,400, but no agreement is made that such marking, aggregation and division shall determine their verdict, but afterward such sum is agreed to, and returned as their verdict: Held, Where such verdict has been approved by the trial court, this court will not disturb the judgment."

In the case of Parshall vs. Minneapolis & St. L. Ry. Co., 35 Fed. 649, the court, speaking through Mr. Justice Brewer, said:

"Two affidavits were filed charging misconduct on the part of the jury; one, an affidavit of a juror that a verdict was reached in pursuance of an agreement that each juror should write down the amount which he thought the plaintiff should receive, and, after adding them together and dividing by 12, that the amount so reached should be the verdict. Of course, if a verdict is reached in pursuance of an agreement to abide by the result of such an addition and division, it is misconduct such as would vitiate the verdict. But it is also true that it is not improper, and is common in matters of this kind, where the amount does not rest upon any fixed rule, but depends upon the discretion of the jury, for each juror to put down the amount which he thinks the plaintiff ought to receive, and the sum of the amounts being divided by twelve places before the jury a basis for further discussion and agreement; and when that is all that is done, such attempt to reach concord and agreement does not vitiate the verdict."

To the same effect, see: Gulf C. & S. F. Ry. Co. v. Blue, — Tex. Civ. App. —, 102 S. W. 128; McDonnell v. Pescadero Stage Co., 120 Cal. 476; Barton v. Holmes, 16 Ia. 252; Kennedy v. Kennedy, 18 N. J. L. 450; Tinkle v. Dunivant, 16 Lea (Tenn.) 503; Bell v. Butler, 34 Wash. 131; McMurdock v. Kimberlin, 23 Mo. App. 523.

It will be seen from the case last quoted that the facts are much like the facts in the case at bar; the material difference being that in the case now before us, after the aggregate sum was divided by 12, there *was* several votes taken, resulting finally in 9 jurors concurring in the verdict returned, which happened to be the result ob-

377 tained by dividing the aggregate amount. It must be of practically universal knowledge, and especially to the profession and the courts, that verdicts of jurors are more or less the result of

compromise. It would be next to impossible to reach a verdict in every case, if this was not so. The court is not able to say that the verdict in this case was not the deliberate opinion of each juror concurring therein, based upon the evidence. This court has held several times, without any apparent qualification, that affidavits or testimony of jurors will not be received for the purpose of impeaching their verdict; Colcord v. Conger, 10 Okla. 458; Barnes v. Territory, 19 Okla. 373; Pitchlynn vs. Cherry, 32 Okla. 77; Tulsa St. Ry. Co. v. Jacobson, 40 Okl. 118; Glockner v. Jacobs, (not yet reported).

Counsel very strenuously question the soundness of these decisions, and claim that the rule based upon sounder reason is found in the case of Crawford v. State. 2 Yearg. 60, by the Supreme Court of Tennessee, and in the case of Perry v. Bailey, 12 Kan. 539, the latter opinion being by Justice Brewer, and others cited where the general and broad rule is modified. While we are impressed with the reason and logic advanced in the opinions cited, inasmuch as we hold that the evidence in this case fails to show that the verdict is a result of a lot or chance, or what is denominated a quotient verdict, we are not inclined to enter into an elaborate discussion of the wisdom of modifying the *board* rule heretofore announcel by this court.

The 3rd, 4th, 11th and 13th assignments challenge the action of the court in overruling the demurrer to the evidence and overruling the motion for a directed verdict. The basis of defendant's contention is that when the court, at the request of plaintiff, withdrew from the consideration of the jury that part of his cause of action relating to defective couplers, plaintiff thereby withdrew from the
378 consideration of the jury all testimony relating thereto, and hence, the effect of which was to leave the case in such condition to show that plaintiff was guilty of contributory negligence, and that all of his testimony bearing upon his cause of action, under the employers' liability law, is unreliable, and should not be given any weight. It is contended that the only logical conclusion is, that in withdrawing from the consideration of the jury his cause of action, based upon defective couplers, after he had testified, is a conclusive admission on his part that the testimony given by him relating to his cause of action under the employers' liability law was false, and hence leaves no reliable testimony for the consideration of the jury, tending to sustain his cause of action. In this conclusion we are unable to agree. These things may materially, but no- necessarily, affect plaintiff's credibility, as a witness, and the weight which might otherwise be given to his testimony, certainly it does not necessarily follow that his testimony is, as a matter of law, false. Had he only alleged a cause of action under the employers' liability law, his testimony as to the defective couplers would have been competent for the purpose of showing a state of facts which justified him in going between the cars, where he claimed he was at the time he was injured. This testimony would have been proper for the purpose of showing that he did not contribute to his own injury. Instead of this being conclusive proof that his testimony upon this point was false, or that he was mistaken, in the couplers being de-

fective, it may be that this part of his cause of action was withdrawn from the consideration of the jury by his counsel over his protest, and while still contending that the couplers were, in fact, defective.

If only one cause of action had been alleged, as we have
379 shown, it would have been perfectly proper for the plaintiff to have testified to the defective condition of the couplers, if he found the same to be in a defective condition, for the purpose of justifying his conduct in being between the cars at the time of the injury, as tending to show that he was not guilty of contributory negligence. It would likewise have been competent for the defendant in order to have shown, if it could have done so, that the couplers were in perfect condition, and that all that was necessary for the plaintiff to have done was to use the lever, which he could have done without getting in between the cars. The plaintiff may have been mistaken in his testimony; that is, he may have been mistaken as to the actual condition of the couplers; yet if he honestly believed and had sufficient facts and circumstances existed at the time, justifying the belief in an ordinary and reasonable man, it would have made a proper issue for the court to submit to the jury for their determination, whether or not be was guilty of contributory negligence. Suffice it to say, that in any event, it was within the province of the jury to pass upon the credibility of this witness and the weight to be attached to his testimony. This issue, having been properly submitted to the jury under a proper instruction, and since there was sufficient evidence to warrant the court in submitting it to the jury, their finding thereon and the approval of their verdict by the trial court is conclusive upon this court.

It is the further contention of defendant, under the assignments which we are discussing, that the court erred in overruling defendant's demurrer to the evidence; for it is claimed that plaintiff failed to show that he was employed and engaged in interstate commerce at the time he was injured. There seems to be no controversy regarding the law, but the issue arises under testimony, tending to show that plaintiff was engaged at the time he was injured in in-
380 terstate commerce, as defined by the provisions of the act of Congress. It seems from the charge of the court given to the jury, to the giving of which there was no exception, the court, as well as the respective counsel, practically agreed upon the law governing the issue upon this point. The court's instruction was as follows:

"You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement of transportation of a car or cars of freight, destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in the other cars of the train, that was to be transported between interstate points, but plaintiff must show by a fair preponder-

ance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the Act of Congress of April 22, 1908, would apply in this case. If, on the other hand, plaintiff has not established that he was so employed in interstate commerce at the time of the injury, then the Act of Congress of April 22, 1908, would not apply in this case."

The only question presented for our consideration is whether or not there was sufficient testimony to warrant the court in submitting this issue to the jury. The testimony of the plaintiff upon this point, in substance, is as follows:

I came from Hope to Ashdown on that day. We reached there about 10:30 in the morning. Defendant's main line and passing track at Ashdown run east and west. It also has a connection there with another road, and a spur going to the staving mill. The swing brakeman works in the middle and handles the switch list. His name was Dan Godbold. Godbold went in ahead of me, and before I entered he came out and told me to bring the engine out on the mill track; that he had to make up the Hugo train. This was about 11 o'clock. We went through the necessary requirements to follow the instructions of the switch list and make up the train. Tom Chamberlain was the engineer. The engine was headed west.
381 Godbold was giving directions from the switch list. He told me we were making up a train for Hugo. We took some cars from the mill spur and put some of them on our train; and took some back, spotted them, and did various other switching. By "our train," I mean the train we were working up for the Hugo crew. When we got through our switching on the staving mill spur, we backed back in there and spotted some cars there. I cut the car I got hurt from, or cut the others from it, and gave the engineer the go-ahead signal. This car and others was attached to the engine which was headed west. There were some cars on the passing track. It was the train we were making up. I walked over to the west end of this cut of cars that was on the passing track and tried the knuckle—the west knuckle. It is necessary to open one of the knuckles when you are going to make a connection between two cars. There is a knuckle on each end of the car. I went there to open the knuckle on the west end of that car. I tried the lever and it would not work, and I tried the knuckle with my hands, and it only gave a portion of the way out.

In answer to questions, the witnesses stated:

"Q. Godbold, you say, was giving directions from the switch list?

A. Yes sir.

Q. And his statements to you were that you were making up a train that was going to Hugo?

A. Yes sir."

Questions propounded to the engineer, Mr. Chamberlain:

"Q. Don't you know that the crew that was there was making, waiting for the train to be made up, to bring it on to Hugo?

A. I knew there was a crew there waiting for that."

The witness further testified:

"Q. What were they waiting for?
A. Waiting for the stuff we brought in.
Q. What do you mean by that? You mean the cars that you brought in from the east?
A. The cars that we brought in from the east; they were going to take them on west.
Q. This other crew?
A. Yes sir.
Q. Whose crew were they?
382 A. Conductor Sanders'.
Q. Where did that run go? From Ashdown on west to Hugo?
A. Yes sir."

The law is, without doubt, that as a prerequisite to the right of plaintiff to recover, under the Employers' Liability Law, it was necessary for him to show that at the time of the injury he was actually engaged in interstate commerce. In a late case, not yet reported, upon a certificate from the Circuit Court of Appeals of the Fifth Circuit, Mr. Justice Van Devanter, speaking for the Supreme Court of the United States, stated the rule as follows:

"Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of both classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * * Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146." St. L. & S. F. & Texas Ry. Co. v. Seale, 229 U. S. 156.

383 In the fifth paragraph of the court's charge, the jury was specifically instructed that it was incumbent upon plaintiff

to show, by a fair preponderance of the evidence, that he was at the time of the alleged injuries actually engaged in assisting in the movement or transportation of a car or cars of freight destines for movement from a point in one State to a point in another State. Under this clear declaration of the law, if there were sufficient testimony to warrant the court in submitting this issue to the jury, and we hold there was, and the jury having found the issue in favor of plaintiff, which has been approved by the trial court, such finding should be, and is, conclusive upon this court. If the question were before this court for decision, in the first instance, upon the record before us, we are not prepared to say, as a matter of law, that plaintiff was not at the time of his injury, engaged in interstate commerce, but would feel justified in holding, under the rule laid down by the United States Supreme Court, that he was at the time of the injury, engaged in interstate commerce.

It is next insisted that the court should have directed a verdict for the defendant, for the reason, it is claimed, that the testimony conclusively shows that plaintiff's injury was due to an assumed risk. It is insisted that this cause of action, having been based upon the Federal Employers' Liability Act, it superseded the provision of our Constitution, and therefore, is a question of law for the court to determine, and in this case, should not have been left to the jury. We have examined the evidence carefully and are of the opinion that the court did not err in refusing to instruct the jury to return a verdict for the defendant. Under the general law, and independent of the provision of our Constitution, where the question of assumption of risk depends upon a controverted issue of fact, it is a question to be submitted to the jury, like all other questions of fact. There
384 was sufficient testimony before the court and jury to warrant the court in submitting the issue of the assumption of risk to the jury, and the trial court, having approved their verdict, it will not be disturbed by us.

Under assignment of error 15, counsel strenuously urge that the court erred in giving to the jury certain instructions. The first one of which complaint is made is instruction 18, relative to the assumption of risk. The instruction is as follows:

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in; and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant. But you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

It is the latter part of the instruction to which complaint is made, claiming that after plaintiff withdrew his charge of negligence respecting the condition of the couplers on the cars involved, the sole charge of negligence remaining was alleged negligence of the engineer in moving the engine in disregard of plaintiff's signal for him

not to do so. It is contended that the language used by the court is equivalent to an assumption of negligence on the part of the engineer, and therefore a comment on the weight of the evidence. In this conclusion, we are unable to agree with counsel. We fail to see how the jury could have been misled in this instruction. The court told the jury, in plain language that if the plaintiff's injury was occasioned by one of the incidents ordinarily attending the occupation for which he was employed, they should find for the defendant. The issue of assumption of risk was raised by the defendant in its answer; and certainly, it was proper to charge the jury upon this issue.

385 After stating to the jury that plaintiff could not recover for an injury resulting from a risk which he himself had assumed, it was not prejudicial to further state to the jury that the plaintiff did not assume the risks that were attendant upon his fellow-servants. Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress, the rule seems to be that the assumption of risk is not a defense; and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the court would not have been warranted in submitting this issue to the jury. The fact that the court may have committed error in charging the jury on this point, under such circumstances, would not warrant a reversal. Inasmuch as we hold there is no substantial error in the court's instruction, affecting the defendant's rights, it is not necessary to enter into an elaborate discussion of this proposition.

It is insisted that instruction No. 13, given to the jury, is erroneous. The instruction reads:

"If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him."

The specific grounds of objection are that the court should have used the word "shall" instead of "should" that the word "should" is merely advisory; and that the jury was left at its discretion in the matter of reduction of the damages. It has been said that the word "should" is the past tense of the word "shall" and we think, in the connection in which it was used, the jury understood that it meant more than simply advisory.

386 In the case of Smith v. State, 41 N. E. 595, the Supreme Court of Indiana held that it was more imperative than the word "may."

In the case of Lynch v. Bates, 139 Ind. 206, where the court charged the jury that in passing upon the weight of the evidence, etc., they "should" take into consideration the interest of the witness,

etc., the court reversed the case, holding that the word "should" there was too imperative.

In the case of Durands, Adm'r v. N. Y. & L. B. R. Co., (N. J.) 48 Atl. 1013, the court held that the word "should" implies the performance of some obligation or duty. Often the word "shall" is used to mean "may." So, it will be seen that either of the terms cannot be considered abstractly, but must be considered in connection with the subject-matter and sense in which it is used.

It is next contended that the instruction is erroneous, because the court did not require the jury to find that plaintiff was injured while engaged in interstate commerce, but simply stated that if the plaintiff was injured while defendant was "engaging" in interstate commerce. Suffice it to say that the court, in instruction No. 5, charged the jury fully upon this point. The instruction here to which complaint is made did not purport to cover this point.

It is further urged that this instruction does not give the jury any intelligent rule by which to assess the damages, in the event the jury found that plaintiff's negligence partially contributed to the accident; while we do not approve this instruction as a model, yet we are convinced that the jury was not in any way misled by taking the instruction as a whole, when considered in connection with the other instruction given.

387 We think this instruction fairly stated the rule, as applied to the act of Congress, by which the jury was to be governed in fixing the amount plaintiff was entitled to recover.

It is next insisted that instruction No. 19 was prejudicial. This instruction, in effect, advised the jury that as many as nine of their number concurring could return a verdict. It is earnestly contended that this was error, for the reason that plaintiff's cause of action arose under the Federal Employers' Liability Law; hence, all the rights of both parties must be measured by the Federal Constitution and laws, and that this includes the procedure governing the trial in Federal courts. It is said that under the Federal Constitution, defendant was entitled to a unanimous verdict of a jury of twelve, and that this right of a unanimous verdict must apply in all cases where the Federal Employers' Liability Law is involved, whether the suit is in the State of Federal Court. This contention is not sound. It would seem that to state the proposition would be sufficient to disclose the fallacy of the argument. Were it not for the recognized ability of counsel and the zeal and earnestness displayed in pressing this point, we should be inclined to dispose of it by what we have just said. While it is true the state courts are under a sworn duty to recognize and enforce the Constitution and laws of the Federal government, yet this does not mean that the state must follow the procedure of the Federal government provided for the conduct of its own courts; that while the state must recognize the Federal Constitution and laws as supreme and enforce them as such, yet in its courts it can only be required to enforce them in accordance with the procedure provided by the state for the enforcement of its own laws. We apprehend that the state has the power to abolish a trial by jury altogether, and

provide that all questions, both of law and fact, should be
388 determined by the court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the state court, and he be denied a jury trial in accordance with the state law; yet, if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a Federal statute. The state is called upon often to enforce and administer the Federal laws in her courts; yet she is only required to do so in the manner provided by and in harmony with the state law, and cannot be compelled to follow the procedure provided by the Federal government for its own courts. The Seventh Amendment to the United States Constitution has reference only to the Federal courts, and such territorial courts as are established by Congress and under the control of the Federal government, and has no application to the state courts. Quotations from a few decisions will demonstrate this to be sound:

In the case of Walker v. Sauvinet, — U. S. —, the court, speaking through Chief Justice Waite, with reference to the Seventh Amendment to the Constitution, said:

"This amendment, as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. 492. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way." Pearson v. Yewdall, 95 U. S. 294; Hall v. Armstrong, (Vt.) 20 L. R. A. 366.

In Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, discussing the jurisdiction of a state court to entertain a cause of action under the Federal Employers' Liability Act, after an elaborate discussion of the proposition, it was said:

389 "We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

The expression "adequate to the occasion" evidently means when, according to the state law, the state courts have jurisdiction over the subject-matter and the parties. The cases cited and relied on by counsel have no application here. As shown by the decisions, the courts there were speaking in reference to the Federal courts or territorial courts, which are necessarily controlled by the Federal Constitution and statutes. Counsel have cited no authority, and we believe none exists, where it is held that the state courts must abandon their procedure and apply the Federal procedure on account of the fact that a right arising under a law of Congress is involved. The expressions of the courts on this subject are all to the contrary.

It is next contended that the court erred in charging the jury on the measure of damages. We have carefully considered this instruction in connection with the other charge of the court, and find no

prejudicial error. We doubt if this instruction, standing alone, would have misled the jury, and when considered with the whole charge, we find no ground for complaint. The court in this charge specially directed the jury to the other portion of the charge. The court, in another section, had charged the jury relative to diminishing the damages in the event they found that plaintiff had contributed to his own injury. It was not necessary to repeat it again in this section.

390 It is next contended that the court committed error in refusing to give certain requested instructions. We have duly considered the action of the court in refusing to give the various charges requested by the defendant, and find this complaint without merit. Several of these requested instructions were faulty as being a charge upon the weight of the evidence, and besides, the court had fully and fairly covered every point raised by the pleadings and which were sought to be covered by the instructions requested.

It is finally urged that the verdict of the jury is excessive. After a careful consideration of this point, we are not prepared to say, under the facts and circumstances of this case, that the verdict is excessive. The trial court and the jury had a much better opportunity to pass judgment upon this matter than we. The record shows this to be rather an aggravated case. We are unable to place ourselves in a position to gain the knowledge from the physical facts and expressions of the plaintiff and many circumstances in connection therewith. The appellate court should, with great reluctance, disturb a solemn finding of a jury, on the ground that it is excessive, after it has been approved by the trial court. We should be thoroughly satisfied that the jury was actuated by passion, prejudice, partiality, or corruption. The verdict should be so outrageously large and excessive as to shock the conscience of man on first blush, before we should feel authorized to use this extraordinary power by reversing or requiring a remittitur. The fact that if we were sitting as jurors we would not fix the amount so large as did the jury, is not sufficient; for, in that case, we would simply be substituting our judgment for that of the jury and the trial judge. St. Louis & S. F. Ry. Co. v. Richards, 23 Okla. 256; 4th Sutherland on Damages, # 1256; 13 Cyc. 126.

391 In the case of San Antonio & A. P. Ry. Co. v. Connell, — Tex. Civ. Ap. —, 66 S. W. 246, plaintiff was an engineer, earning about $135 to $150 per month. He was 41 years of age; lost the use of one leg, though it was not amputated. A verdict for $18,000 was cut to $16,000, and sustained.

In Missouri, K. & T. Ry. Co. v. Stinson, 78 S. W. 986, plaintiff was a switchman, 26 years of age, earning $90.00 per month. The ankle joint of his right foot was injured, making said joint permanently stiff, and he could not walk without crutches, and his leg was crooked. A verdict for $15,000 was sustained.

In Lynch v. American Linseed Co., 107 N. Y. Sup. 458, plaintiff's legs were mangled and crushed so he was made a cripple. A verdict for $20,000 was sustained.

In M. K. & T. Ry. Co. v. Farriss, 120 S. W. 535, plaintiff was a

young man, of industrious habits. He lost the use of both legs and was a permanent cripple. A verdict of $23,750 was sustained.

In Galveston, H. & S. A. Ry. Co. et al. v. Harris, — Tex. Civ. App. —, 159 S. W. 907, plaintiff was a brakeman, 35 years old, in good health, and earning an average salary of $100 a month. His right leg was dislocated at the hip, and thereafter it became paralized, which wholly prevented his use of the leg. Whether this condition was permanent was not clear. A verdict of $27,500 was reduced to $22,500 and sustained.

392 In Gennaux v. Northwestern Imp. Co., — Wash. —, 130 Pac. 347, the injury to plaintiff resulted in the loss of use of one leg. A verdict for $18,000 was sustained.

In case of Coleman v. Southwich, 9 Johns, 40, Chancellor Kent laid down the rule as follows:

"The damages, therefore, must be so excessive as to strike mankind at first blush as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

We think this is a sound rule, and approve the same. This is in harmony with the holding in the case of C. R. I. & P. v. Devore, decided at this term.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

All the Justices concur, except Chief Justice Kane, not participating.

393 In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error and respectfully asks for a reconsideration and rehearing upon the decision of this Court, rendered herein on September 22, 1914, by which decision the judgment of the lower court in the above entitled cause was affirmed, for the reason that questions decisive of said case, and duly submitted by counsel, have been overlooked by the Court, and that the decision is in conflict with controlling decisions of this Court and with controlling decisions of the Supreme Court of the United States, which have been overlooked, as will be more fully hereinafter set out.

The propositions upon which we rely in support of this petition for rehearing will be discussed under the following hands:

I.

The decision is erroneous in that the Court is in error in holding that the verdict of the jury was not arrived at by lot or chance, and that said verdict was not a quotient verdict.

II.

The decision is erroneous in holding that the demurrer of plaintiff in error to the evidence of defendant in error should not have been sustained:

(1) Because the decision is predicated upon a hypothetical case rather than upon the record herein.

394 (2) Because the decision is predicated upon a misconception of the evidence.

(3) Because the decision is erroneous, in that the Court's reasons as to why a verdict should not have been directed for the plaintiff in error are predicated upon a misconception of the evidence and of the law applicable thereto.

III.

The decision is erroneous in that it announces a doctrine respecting the assumption of the risk of employment that is in conflict with decisions of this Court, and with decisions of the Supreme Court of the United States.

IV.

The decision is erroneous in that it holds that the lower court's instruction No. 13 is a correct exposition of the law applicable to the facts in this case; when, as a matter of fact, it is in direct conflict with the spirit and intention of the Employers' Liability Act, and in direct conflict with the decision of the United States Supreme Court, construing said Act.

V.

The decision is erroneous in that it holds that the lower court's instruction on the measure of damages is correct and is in accord with the rule laid down by the Supreme Court in construing the Employers' Liability Act.

VI.

The decision is erroneous in that it holds that nine jurors may return a verdict in an action prosecuted in a State Court, under the Employers' Liability Act.

VII.

The decision is erroneous in that the Court fails to consider the error of the trial court in refusing to submit to the jury the plaintiff in error's theory of the case.

395 VIII.

The decision is erroneous in that the Court fails to consider the error of the trial court in refusing to give the several instructions requested by plaintiff in error, and of which it complains.

IX.

The decision is erroneous in that it holds that the damages awarded to defendant in error are not excessive, and in that the decision of the Court, upon this feature of the case, is predicated upon a misconception of the evidence.

Wherefore, Plaintiff in error prays that a rehearing of said cause may be had by this Honorable Court; and further prays, in view of the heavy trial docket which counsel for plaintiff in error have, and the importance of the questions involved, that an order be made allowing plaintiff in error twenty (20) days from the 7th day of October, 1914, in which to prepare and file briefs in support of this petition for rehearing.

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J. H. GRANT,
Attorneys for Plaintiff in Error.

Service of the within and foregoing petition for rehearing and receipt of a copy thereof is hereby acknowledged this 6th day of October, 1914.

STUART, CRUCE & CRUCE,
Att'ys for Defendant in Error.

Filed Oct. 6, 1914. W. H. L. Campbell, clerk.

396–398 And afterward, on October 6, 1914, the following proceeding was had in said cause, to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

And now on this October 6, 1914, it is ordered by Turner, J., that the mandate of this court in the above cause be stayed, and plaintiff in error allowed 15 days to file brief in support of petition for rehearing.

* * * * * * *

399 Supreme Court, January Term, 1915, March 2nd, 1915, Fifteenth Judicial Day.

5209.

ST. L. & S. F. R. R. Co., Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

And now on this day the above cause comes on for hearing before the court, and upon application therefor in open court, it is ordered by the court that the stipulation herein asking leave to detach exhibits from the original case made, to be attached to the case made on appeal to the Supreme Court of the United States, be filed.

400 In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between counsel for plaintiff in error and defendant in error, respectively, that the original exhibits attached to the original case-made, except a certain pair of overalls and the shoes which defendant in error wore at the time he was injured, now on file in the office of the Clerk of the Supreme Court of Oklahoma, may be detached from the case-made and attached to the copy of said case-made, which is to be filed in the Supreme Court of the United States.

Dated this 2 day of March, 1915.

R. A. KLEINSCHMIDT,
Attorney for Plaintiff in Error.
STUART, CRUCE AND CRUCE,
Attorneys for Defendant in Error.

Filed Mar. 2, 1915, William M. Franklin, Clerk.

401 In the Supreme Court.

5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Now on this 4th day of March, 1915, it is ordered by Kane, C. J., that the stipulation to detach exhibits from the original case made to

be attached to case made on appeal to the Supreme Court of the United States be and the same is hereby allowed

402 In the Supreme Court of the State of Oklahoma.

Certificate.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the *the* foregoing 401 pages, numbered from 1 to 401, both inclusive, are a full, true and complete transcript of the record and all proceedings in cause No. 5209, St. Louis and San Francisco Railroad Company, Plaintiff in error. vs. Harry A. Brown, Defendant in error, as the same remains of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 5th day of March, 1915.

[Seal Supreme Court. State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

403 In the Supreme Court of the United States.

No. 874.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Statement of Errors and Part of the Record to be Printed.

Comes now St. Louis and San Francisco Railroad Company, plaintiff in error herein, and for a statement of the errors upon which it intends to rely, says: That it intends to rely upon the errors set forth in its assignment of errors, numbered from 1 to 10 inclusive, filed in this cause and made a part of the record herein.

And said plaintiff in error hereby designates the parts of the record to be printed, which it thinks necessary for the consideration of this Court, and designates the parts of the record to be omitted, viz:

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W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

We, the undersigned attorneys of record for the defendant in error, hereby acknowledge service of the within and foregoing statement of errors and part of record to be printed, this 1st day of April, 1915.

L. S. DOLMAN,
STUART, CRUCE & CRUCE,
Attorneys for Defendant in Error.

408 [Endorsed:] No. 874. 24,618. In the Supreme Court of the United States. St. Louis and San Francisco Railroad Company, Plaintiff in Error, vs. Harry A. Brown, Defendant in Error. Statement of errors and part of the record to be printed.

409 [Endorsed:] File No. 24,618. Supreme Court U. S., October term, 1914. Term No. 874. St. Louis & San Francisco R. R. Co., Pl'ff in Error, vs. Harry A. Brown. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed April 5, 1915.

410 In the Supreme Court of the United States.

No. —.

ST. LOUIS AND SAN FRANCISCO RY. CO., Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Statement of Portions of the Record That Defendant in Error Desires Printed.

Now comes the Defendant in Error, Harry A. Brown, and in addition to the parts of the record required by the Plaintiff in Error to be printed, he designates the following portions of the record, which should be, and which he requests to be printed.

I.

The Cross-Examination of N. E. Jacques, pages 262-266 inclusive.

II.

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III.

Testimony of J. E. Roberts, pages 274-277 inclusive.

411 —.

Cross-Examination of D. N. Baldwin, pages 279-283 inclusive.

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Testimony of Frank Robinson, pages 292-297 inclusive.

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Testimony of Joe Pierce, pages 297-299 inclusive.

VIII.

Testimony of Harry A. Brown, pages 299-300 inclusive.

IX.

Testimony of Harry A. Brown pages 303-304 inclusive.

X.

Requested instruction No. 6 on page 308.

C. B. STUART,
A. C. CRUCE,
M. K. CRUCE, AND
L. S. DOLMAN,
Attorneys for Defendant in Error.

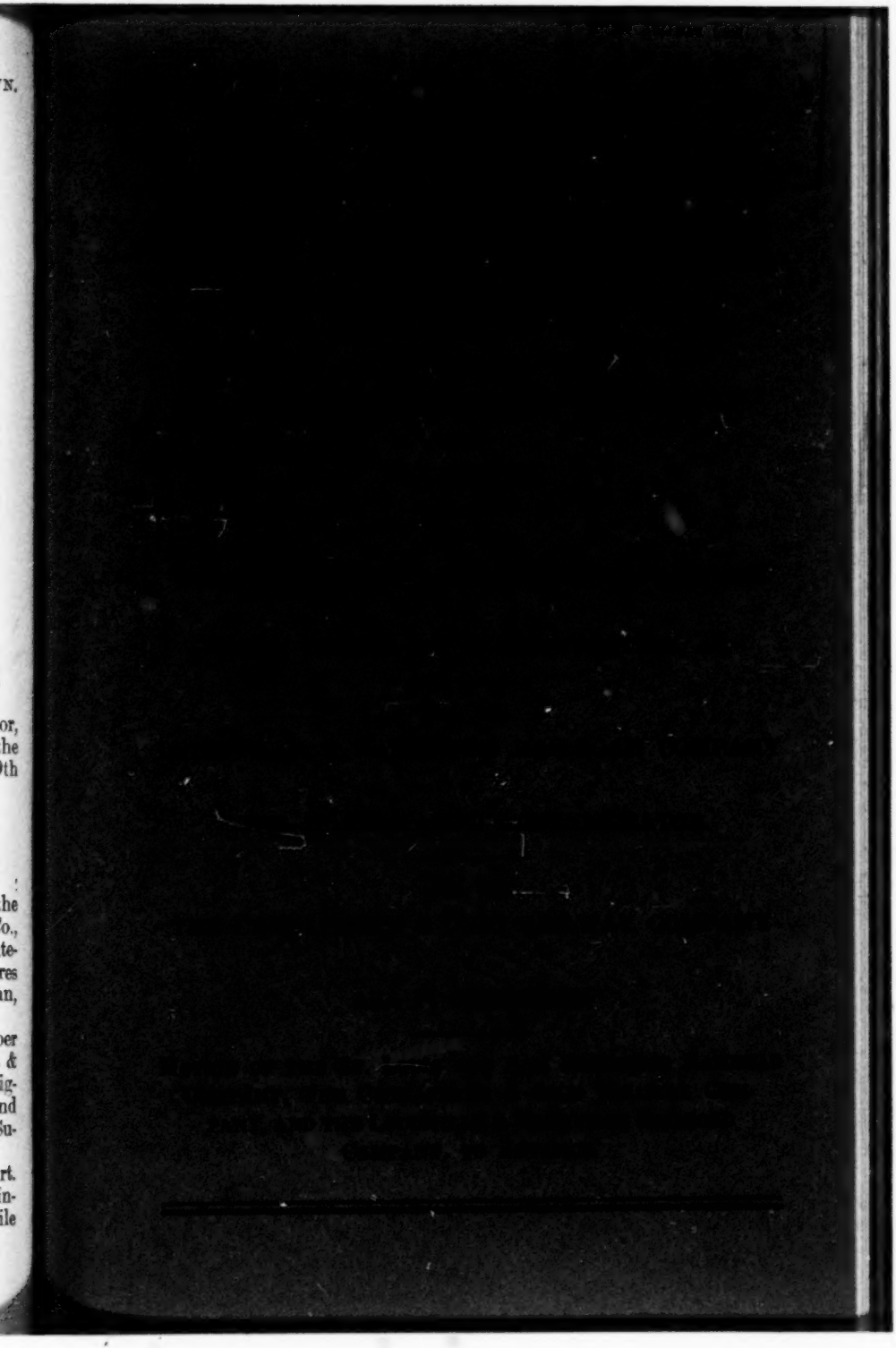
We, the undersigned attorneys of record for the plaintiff in error, hereby acknowledge service of the within and foregoing parts of the record designated by the defendant in error to be printed, this 19th day of May, 1915.

R. A. KLEINSCHMIDT,
——— ———,
Attorneys for Plaintiffs in Error.

412 [Endorsed:] 874/24618. In the Supreme Court of the United States. No. 874. St. Louis & San Francisco Ry. Co., Plaintiff in Error, vs. Harry A. Brown, Defendant in Error. Statement of Portions of the Record that Defendant in Error Desires Printed. C. B. Stuart, A. C. Cruce, M. K. Cruce, and L. S. Dolman, Attorneys for Defendant in Error.

413 [Endorsed:] Supreme Court of the United States, October Term, 1914. File No. 24,618. Term No. 874. St. Louis & San Francisco Ry. Co., Pl'ff in Error, vs. Harry A. Brown. Designation by defendant in error of parts of record to be printed, and proof of service of same. Filed May 21, 1915. Clerk's Office, Supreme Court U. S.

Endorsed on cover: File No. 24,618. Oklahoma Supreme Court. Term No. 399. St. Louis & San Francisco Railroad Company, plaintiff in error, vs. Harry A. Brown. Filed March 17th, 1915. File No. 24,618.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 399

ST. LOUIS AND SAN FRANCISCO RAILROAD CO.

v.

H. A. BROWN.

No. 453

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

SARAH DWYER, AS ADMINISTRATRIX, &c.

No. 485

LOUISVILLE & NASHVILLE RAILROAD COMPANY

v.

WM. H. STEWART'S ADMINISTRATOR

No. 743

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN

MOTION OF THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, TO ADVANCE.

Come now counsel for the St. Louis and San Francisco Railroad Company, The Chesapeake & Ohio Railway Company and the Louisville & Nashville Railroad Company, and move the court to advance the above entitled causes to be heard at the same time with the case of *The Chesapeake & Ohio Railway Company* v. *Kelly's Administratrix*, No. 321, October Term, 1915.

In the four causes thus sought to be advanced and heard at the same time, there is presented a question common to them all (and presented, also, in No. 321), which question is, whether the Seventh Amendment of the Constitution of the United States is a restraint upon Congress and prevents Congress from committing to the State courts for trial causes of action under the Federal Employers' Liability Act (35 Stat. 65, 66; 36 Stat. 291), in States where jury trial as preserved in the Seventh Amendment is no longer preserved. Stated in another way, the question is whether State courts in such of the States as have jury

trials by fractional verdicts, or by less than a common law jury, are appropriate, adequate, and competent courts to try causes under said Federal Employers' Liability Act. An early determination of this question is necessary to designate the *fori* wherein these causes of action shall be entertained. Public interests are, accordingly, involved. The consolidation of these five cases to be heard together will sacrifice no interest of the litigants, the Constitutional question being common to all five cases.

W. F. EVANS,
Of counsel for St. Louis and San Francisco Railroad Company.

DAVID H. LEAKE,
E. L. WORTHINGTON,
Of counsel for The Chesapeake & Ohio Railway Company.

SIMS, RODES & SIMS,
BENJAMIN D. WARFIELD,
Of counsel for the Louisville & Nashville Railroad Company.

Counsel for defendant in error, in *Louisville & Nashville Railroad Company* v. *Wm. H. Stewart's Administratrix, No. 485.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *Louisville & Nashville Railroad Company* v. *Wm. H. Stewart's Administratrix, No. 485,* to be heard with the case of *The Chesapeake*

& Ohio Railway Company v. *Kelly, Administratrix, No. 321,* October term, 1915.

SIMS, RODES & SIMS,
BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

To Messrs. B. F. Proctor and Wright & McElroy, counsel for defendant in error.

Service of the above notice is accepted this 22nd day of January, 1916.

B. F. PROCTOR,
GEORGE H. LAMAR,
WRIGHT & MCELROY,
Counsel for Defendant in Error.

Counsel for defendant in error, in
The Chesapeake & Ohio Railway Co. v. *Asa P. Carnahan, No. 743.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *The Chesapeake & Ohio Railway Co.* v. *Asa P. Carnahan, No. 743,* to be heard with the case of *The Chesapeake & Ohio Railway Co.* v. *Kelly, Administratrix, No. 321,* October term, 1915.

DAVID H. LEAKE,
Counsel for Plaintiff in Error.

To Messrs. Allen & Walsh, counsel for defendant in error.

The above notice is accepted and concurred in, this 25th day of January, 1916.

H. W. WALSH,
Counsel for Defendant in Error.

Counsel for defendant in error in
The Chesapeake & Ohio Railway Co. v. *Sarah Dwyer, as Admx., etc., No. 453.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *The Chesapeake & Ohio Railway Co.* v. *Sarah Dwyer, as Admx., etc.,* to be heard with the case of *The Chesapeake & Ohio Railway Co.* v. *Kelly, Administratrix, No. 321,* October term, 1915.

E. L. WORTHINGTON.
Counsel for Plaintiff in Error.

To George B. Martin and Dinkle & Pritchard.
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 26th day of January, 1916.

DINKLE & PRICHARD,
GEORGE B. MARTIN.
Counsel for Defendant in Error.

Gentlemen:

Please take notice that a motion will be made at a session of this Court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *St. Louis and San Francisco Railroad Company* v. *H. A. Brown, No. 399,* to

be heard with the case of *The Chesapeake & Ohio Railway Company* v. *Kelly, Administratrix, No. 321,* October Term, 1915.

W. F. EVANS,
Counsel for Plaintiff in Error.

To Stuart, Cruce and Cruce,
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 24th day of January, 1916.

A. C. CRUCE,
Counsel for Defendant in Error.

The Chesapeake & Ohio Railway Company, plaintiff in error in case No. 321, hereby consents that causes named in the caption of this motion, Nos. 399, 453, 485 and 743, be advanced to be heard at the same time as case No. 321.

THE CHESAPEAKE & OHIO RAILWAY CO.,
By JOHN T. SHELBY,
Its Attorney.

This January 25, 1916.

19

Office Supreme Court, U. S.
FILED
MAR 18 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN,
Defendant in Error.

No. 399.

In Error to the Supreme Court of Oklahoma.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Counsel for Plaintiff in Error.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, *Plaintiff in Error,* vs. HARRY A. BROWN, *Defendant in Error.*	No. 399.

In Error to the Supreme Court of Oklahoma.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Harry A. Brown, defendant in error (hereinafter referred to as plaintiff), instituted suit in the District Court of Carter County, Oklahoma, to recover damages on account of personal injuries alleged to have

been sustained at Ashdown, in the State of Arkansas, on February 20, 1911. Plaintiff's petition was based upon the Federal Safety Appliance Act and upon the Federal Employers' Liability Act (Tr., pp. 22, 24). The trial resulted in a verdict and judgment for plaintiff in the sum of $16,900, which judgment was on appeal to the Supreme Court of the State affirmed (144 Pac. 1075). Petition for rehearing was filed, which was overruled, and a writ of error obtained from this Court to reverse the judgment of the Supreme Court of the State of Oklahoma.

This case was on February 21, 1916, ordered advanced, with cases Nos. 453, 478, 485 and 743, to be heard with case No. 321, as one case. A joint brief having been filed in these cases on the question of the seventh amendment as affecting Federal employers' liability cases in state courts, this supplemental brief will deal with other points involved in this case, with supplemental argument on the right of trial by jury, in cases arising under the Federal Employers' Liability Act.

The Federal questions presented arise out of the construction and application of the Act of Congress of April 22, 1908 (35 Stat. at L. 65), as amended by the Act of April 5, 1910 (36 Stat. at L. 291), known as the Federal Employers' Liability Act; the act was pleaded in plaintiff's petition, and the questions arise out of the defense of assumption of risk, under that act, the

effect to be given plaintiff's contributory negligence, if found, the measure of damages under the act, and the right of less than the full number of twelve jurors to return a verdict under the act. The jury in District Courts of Oklahoma is composed of twelve men; but, by provision of the State Constitution, nine members of such jury, concurring, may return a verdict. In this case the verdict, in favor of plaintiff and against the defendant, was returned by nine jurors (Tr., p. 156).

The printed record does not include the entire record certified by the Clerk of the Supreme Court of the State, but only such parts thereof as are necessary for a consideration of the issues presented to this Court for determination, the record having been prepared and printed pursuant to paragraph 9 of rule 10 of this Court.

ABSTRACT AND REVIEW OF EVIDENCE.

Plaintiff's petition, filed in the District Court of Carter County, alleges that the defendant was engaged in the operation of a line of railway between Hugo, in the State of Oklahoma, and Hope, in the State of Arkansas, and that the plaintiff, while employed as an extra freight brakeman, engaged in making up a train destined for Hugo, Oklahoma, at the Town of Ashdown, Arkansas, was injured through the negligence of defendant's engineer. It is further alleged that, while

engaged in switching cars at said place, plaintiff stepped between the rails to fix the knuckle on the coupler of a certain car, whereupon the engineer of the train, disregarding plaintiff's signal to wait, suddenly backed said car against the plaintiff, precipitating him to the ground, causing certain injuries. It is further alleged that the couplers on both cars which plaintiff was engaged in preparing to be coupled together were so defective that they would not couple automatically by impact, as required by Act of Congress of March 2, 1893 (Safety Appliance Act); that it was therefore necessary for plaintiff to go between the ends of the cars to fix same so that they would couple by impact (Tr., pp. 22-3-4).

To this petition defendant answered in part as follows (Tr., pp. 27 to 30):

IV.

"Further answering and for further defense, defendant specifically denies that either or both of the cars described in paragraph 5 of plaintiff's petition was defective, or that the same were equipped with couplers so defective that they would not couple automatically by impact as required by the Act of Congress of March 2nd., 1893, as amended by Act of April 22nd, 1908; and said defendant specifically denies that the said cars, or either of them, were not equipped with couplers and appliances in strict compliance with said Acts of Congress.

V.

"Further answering and for further defense, defendant specifically denies that it was or became the duty of said plaintiff, or was necessary for him in the performance of his duties, to go in between the ends of the said cars in order to fix the same, or to make a coupling, and alleges that said cars and each of them were properly equipped with operating levers by which knuckles and couplers on the said cars, and each of them, could be prepared for coupling by impact by plaintiff while standing outside of the track, and without going between the said cars.

VI.

"Further answering and for further defense, defendant denies that the injuries, if any, sustained by the plaintiff were caused in any manner by the negligence of this defendant, and alleges that if his said injuries were caused or contributed to by any act of negligence save his own, it was the negligence of a fellow servant or fellow servants of the said plaintiff, for which the defendant would not be liable.

VII.

"Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the said plaintiff were due to and directly contributed to by his own negligence in the premises, in this, to-wit, that the said plaintiff, while engaged as brakeman in assisting in the switching of cars at Ashdown, Arkansas, gave the

engineer of the train a signal to back up, in obedience to which the said engineer caused the engine and cars connected therewith to back, and the said plaintiff carelessly and negligently, in disregard of his own safety and the rules of the company, went between two of said cars while they were moving, or in front of one of the cars while so moving, and in some way unknown to this defendant slipped and fell upon the rails and was run over; that it was not necessary for the plaintiff to go between or in front of the moving cars, and that his act in doing so was in plain disregard of his own safety and was the direct cause of his injury.

VIII.

"Further answering and for further defense, defendant alleges that at the time plaintiff secured employment with the defendant, as a part of the consideration of his employment by said company, he entered into a contract and agreement, signed by him, which has at all times since been in full force and effect, and a copy thereof is hereto attached, marked 'Exhibit A' and made a part hereof.

"That in paragraph 12 of said contract it is provided as follows:

> " 'In further consideration of such employment, I agree that if, while in the service of said company, I sustain any personal injury for which I shall or may make claim against the company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a superintendent,

claims attorney or claim agent of said company, which notice shall state the time, place, manner and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.'

"Defendant alleges that the said plaintiff has wholly failed, neglected and refused to comply with such provision of said contract and has not given any notice in writing of his claim for the alleged injuries to the superintendent, claim attorney or claim agent of the defendant, stating the time, place, manner and cause of his injuries and the nature thereof and the claim made therefor; and defendant alleges that by the failure of the plaintiff to give such notice as is required by said contract he should be barred from maintaining this suit, or recovering any damages thereunder.

IX.

"Further answering and for further defense, defendant alleges that at the time plaintiff secured employment with the defendant he entered into a written contract, duly executed by him, as part consideration of securing such employment, a copy of which is hereto attached, marked 'Exhibit A', and made a part hereof.

"That in paragraph 12 of said contract it is stipulated and agreed as follows:

" 'I hereby certify that the foregoing statements are true, and hereby apply for a situation in the service of the St. Louis & San Francisco Railroad Company; and, if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the general and special rules and regulations of the department of service in which I may be employed and faithfully observe the same, and keep advised of such amendments to said rules and regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntarily or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said company to make monthly deductions from my wages, in accordance with circular No. 35 of June 29, 1899, and pay the same to the Employes' Hospital Association of the Frisco System; and if I am accepted as an employe I authorize the deduction of one dollar to cover medical examination fee. I understand that standing in front or getting onto an engine or car coming towards me is dangerous and is in violation of the rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car, and that it is dangerous to climb up

and down the sides of cars while passing water-tank spouts, sandhouse pipes, coal houses, seed houses, cotton platforms or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion, is dangerous and is forbidden by the rules of the company, and I agree to refrain from so doing.

" 'I understand that the duties of a brakeman expose me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others.'

"In addition thereto, plaintiff signed an additional paragraph on the last page of said agreement, recognizing that he was prohibited from going between cars. That the plaintiff thereby agreed and undertook to assume the hazards and risks of his employment; that the occupation of brakeman on a freight train is necessarily a dangerous and hazardous one; that the plaintiff, well knowing this fact, as aforesaid, applied for and secured employment with the defendant as such brakeman and elected to remain in the employ of the defendant, with full knowledge of all the risks, hazards and dangers incident to his employment, and he thereby assumed such risks, dangers and hazards; and defendant alleges that if the plaintiff was injured as alleged, such injuries were the direct result of a risk of his employment assumed by him, by reason of which he is not entitled to recover herein.

"That among the rules promulgated by the defendant company, and in force on its lines, necessary for the safety of employes, were the following, which were well known to the plaintiff when he accepted employment of the defendant and which, as aforesaid, he undertook and agreed to obey:

"'**General Notice.**

"'To enter or remain in the service is an assurance of willingness to obey the rules.

"'Obedience to the rules is essential to the safety of passengers and employes and to the protection of property.

"'Employes in accepting employment assume its risks.

"'Rule No. 630. All persons entering into or remaining in the service of this company are warned that the business is hazardous and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

"'Rule No. 631. Each employe is required to be responsible for his own safety, as well

as to exercise the utmost caution to avoid injury to his fellow employes. Employes of every rank and grade are warned to see for themselves before using them that the rolling stock, machinery or tools which they are required to use are in safe condition or that they are so put before using them.

" 'Rule No. 632. The company does not require or expect its employes to incur any risk from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.

" 'Rule No. 634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it dangerous to expose the hands, arms or person of those engaged in coupling cars, all employes will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

" 'Rule No. 636. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen will be obeyed when obedience to those signals on the part of the engineman or fireman is essential to the safety of an employe in the performance of his duty. He must know that the signal has been seen, understood and obeyed before plac-

ing himself in a dangerous position—otherwise, without such knowledge he assumes all risks of danger arising from any misunderstanding or disregard of signals.

"'Rule No. 637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed or go between cars in motion to uncouple them, or to follow other dangerous practices.'

"That the plaintiff thereby assumed the risks incident to his employment; that his injuries, if any, were sustained as an incident of such risks, by reason of which he is not entitled to recover herein.

"Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the plaintiff were directly due to his own negligence and want of care in this, among other things, to-wit, that he carelessly and negligently violated the provisions of his written contract of employment heretofore referred to, and also all or part of the following rules and regulations of the company, to-wit: Rules Nos. 630, 631, 632, 634, 636 and 637, which said rules have heretofore been set out in paragraph IX hereof; and defendant alleges that if the plaintiff had observed said rules he would not have sustained any injuries; that he could have performed his duties as brakeman, with entire safety to himself; that it was not necessary for him to go between cars, or to go in front of a moving car; nor was it necessary for him to oper-

ate, or attempt to operate, or adjust the couplers or knuckles on the car or cars in question, while he was between cars or on the track; that the plaintiff in doing these acts, or either of them, was acting in direct violation and disregard of the rules and regulations of the defendant which had been established for his own safety, as well as said agreement; and that if he was injured while so doing he was guilty of contributory negligence, directly causing such injuries, by reason of which he is not entitled to recover herein.

"Wherefore, having fully answered, defendant asks to be hence discharged with its costs."

At the trial of the case it appeared that plaintiff, at the time he was injured, was employed by the defendant as brakeman, and was running between Hope and Ashdown, both towns being in the State of Arkansas.

Plaintiff states that he left Hope early in the morning, arriving at Ashdown about 10:30 a. m. Reference to Plaintiff's Exhibit "A" (Tr., insert after page 144) will disclose the location and direction of defendant's tracks at Ashdown. During the switching operations just preceding plaintiff's injury a number of cars had been placed on the passing track east of the switch connecting the stave mill track with the passing track, and about a quarter of a mile east of the depot. Afterward, a string of about twelve cars was picked up by the engine, west of the stave mill connection, some of which were to be placed on the stave mill track. The

engine was headed west. Brakeman Brown was following the engine and was riding the string of cars. Brakeman Godbold was handling the switching list and was on the ground. Godbold threw the switch to enable the cars to be pushed in on the stave mill track.

Up to this point there appears to be no serious dispute in the evidence; but there is a sharp conflict as to the circumstances of the accident to plaintiff. However, in view of the contention of the defendant, as made in the trial court, in the State Supreme Court, and here, that, in so far as pertains to the assumption of the risk of injury by the plaintiff, but one conclusion can be drawn from the evidence, it is deemed proper to briefly review the same.

Plaintiff claims that, after the cars were spotted on the stave mill track, he cut them loose from the other cars attached to the engine, which were six or seven cars, and that he then gave the engineer the "go-ahead" signal; that he rode the rear car of the string for a short distance and then stepped off and walked in a southerly direction over to the string of cars standing on the passing track, which they were going to couple onto; that he caught hold of the lever and tried to open the knuckle of the coupler, but it would not work; that he then turned and faced the west, and just as the string of cars attached to the engine was passing through the switch on to the passing track he gave the engineer a stop signal, and that when the

string of cars came to a stop the east end of the rear car was from four to seven feet west of the stave mill switch; that he moved up about three steps and lined the switch; and that he then gave the engineer a spot signal, which meant for him to stand still until he got another signal; that he then went south across the track to get to the lever for the purpose of operating the knuckle on that car; and that he stopped between the rails, took hold of the lifting pin, and it would not work the knuckle; that he then put his right hand on the knuckle to open it, and just as he got his hand on the knuckle he heard the motion of the cars—the engine taking up the slack—and heard them coming back; that he stepped out to the left and as he did so the car hit him in the side and knocked him down; that he rolled over to try to get out of the way and succeeded in getting all of his body beyond the south rail, except his feet; and that they were run over and mashed—the left one seriously, and the right one not so badly.

Defendant's evidence shows that, after the cars were spotted on the stave mill track, plaintiff rode the string of cars attached to the engine out to the switch; that as the last car passed through the switch he dropped off the car, gave the engineer a stop signal, threw the switch, and then gave a back-up signal while standing at the switch and on the north side of the passing track; that he then started across the track just be-

hind the car, and passed out of sight of the engineer, and was not seen again until after he was injured.

There was no dispute in the evidence that, as alleged in defendant's answer, plaintiff, in his application for employment, recognized the risks to be assumed in the occupation of brakeman; also, that under the rules of the defendant, with which he was familiar, plaintiff was prohibited from going between cars while in motion, and assumed all risks of injury from any misunderstanding or disregard of signals given the engineer (Tr., pp. 28, 29, 54, 55). It also appears that he had been employed as brakeman on the line in question since July previous to the accident, and was familiar with the stations along that line, including Ashdown (Tr., p. 55).

Plaintiff alleges in his petition that the coupling apparatus on both the end of the car that struck him and on the west end of the car of the stationary string of cars to which they were going to couple were out of order and would not operate and makes this his excuse for giving the standstill signal, and for going between the rails to adjust the coupler. But, when the evidence was all in, plaintiff withdrew his charge of negligence respecting the condition of the couplers, and the trial court, at plaintiff's request, instructed the jury with respect thereto as follows:

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim that

plaintiff's injuries were caused, in whole or in part, by failure of defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

The trial court, refusing to direct a verdict for the defendant, submitted to the jury the question of whether plaintiff was engaged in interstate commerce at the time of the accident, charged the jury as to the defense of assumption of risk and the effect to be given plaintiff's contributory negligence, if found, and likewise charged the jury on the measure of damages. The jury was further instructed that if as many as nine agreed on a verdict, those so agreeing should sign the verdict.

The questions involved herein, and the manner in which same arose, are briefly stated as follows:

By motion for a directed verdict, which was overruled by the trial court (Tr., p. 147), which ruling was reviewed and affirmed by the State Supreme Court (Tr., pp. 174, 175), defendant contended that in view of the evidence, and in view of the abandonment by plaintiff of his claim that the injuries were caused, in whole or in part, by defective couplers and safety appliances, required by the Federal Safety Appliance Act, he should be held by the Court as a matter of law, the facts being undisputed, to have assumed the risk of injury by going between, or in front of, moving cars;

and that therefore a verdict should have been directed for the defendant. The Supreme Court not only denied this contention, thereby depriving it of a right arising under the Federal Employers' Liability Act, but further held that defendant could not interpose the defense of the assumption of risk in this cause, thereby depriving defendant of a right arising under said Federal Employers' Liability Act (Tr., p. 179).

A question also arises from the instruction to the jury given by the trial court (Tr., p. 154), that if nine jurors agreed they could return a verdict, and from the Court's action in approving and rendering judgment upon the verdict signed by less than twelve jurors (Tr., pp. 155, 156); this ruling of the trial court being reviewed and affirmed by the State Supreme Court in its opinion (Tr., pp. 180, 181), by which it is contended that the defendant was deprived of a right arising under the Federal Employers' Liability Act.

Other questions arise out of the instructions given by the trial court to the jury, duly excepted to by defendant, as follows:

> "(13) If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such

negligence on part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him" (Tr., p. 152).

"(18) You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow-servant" (Tr., p. 153).

"(19) Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court" (Tr., p. 154).

The giving of said instructions, and each of them, was approved by the State Supreme Court (Tr., pp.

178, 179, 180). Defendant contends that it was thereby deprived of substantial rights arising under the Federal Employers' Liability Act.

Other questions arise out of the refusal of the trial court to give to the jury the instruction requested by the defendant as follows:

> "(12) If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:
>
> " 'That in all actions hereafter brought against any such comomn carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributed to such employe.'
>
> "The statute requires the jury to diminish the amount of recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the Court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in statute we are required to look to the intent and pur-

pose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence

of the plaintiff and the balance remaining will be the amount of your verdict'' (Tr., p. 12).

The ruling of the trial court upon this instruction was affirmed by the State Supreme Court (Tr., p. 182), and defendant claims that it was thereby deprived of substantial rights under the Federal Employers' Liability Act.

ASSIGNMENT OF ERRORS.

(Tr., pp. 10, 11, 12, 13, 14 and 15.)

I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, State of Oklahoma.

II.

The Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Carter County, State of Oklahoma.

III.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause; and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, was not exclusive of the Constitution, laws, and regulations of the State of Oklahoma, as to actions prosecuted under said act.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error

grew out of a violation of a statutory duty, arising under an Act of Congress; and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not abandon and withdraw all his testimony respecting such alleged violation of said statute.

VI.

The Supreme Court of Oklahoma erred in holding that, after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

VII.

The Supreme Court of Oklahoma erred in holding that the following instructions, given by the trial court, was not erroneous:

"(13) If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. Excepted to by defendant, S. H. Russell, Judge."

VIII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"(18) You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow-servant. Excepted to by defendant, S. H. Russell, Judge."

IX.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

> "(19) Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

> "(12) If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:
>
> > "'That in all actions hereafter brought against any such common carrier by railroad

> under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'

"The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the Court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word . struct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether

or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict. Refused; defendant excepts. S. H. Russell, Judge."

BRIEF OF ARGUMENT.

III, IX.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause, and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, as amended, was not exclusive of the Constitution, laws and regulations of the State of Oklahoma as to the actions prosecuted under said act.

The verdict in this case, upon which judgment for the plaintiff was rendered, was signed by nine jurors (Tr., p. 156). This verdict was returned pursuant to instruction No. 19 given by the trial court and duly excepted to by defendant (Tr., p. 154), which is as follows:

> "Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court."

This verdict and this instruction were challenged by

motion for new trial (Tr., pp. 158, 159), and the contentions of defendant were expressly ruled upon and denied by the opinion of the Supreme Court of Oklahoma (Tr., p. 181), and the point is raised in this court by assignments of error III and IX.

What is presented herein under these assignments is supplemental to the argument in the joint brief filed in this and other cases on the question of the Seventh Amendment as affecting Federal employers' liability cases in state courts.

Section 19, Article II of the Constitution of Oklahoma provides as follows:

> "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but in county courts and courts not of record a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases and in criminal cases less than felonies three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors the verdict shall be in writing and signed by each juror concurring therein."

It is manifestly the settled doctrine of the Federal Courts that Congress, in the exercise of its admitted power to regulate commerce between the states, has taken complete possession of the subject of liability of interstate carriers for injury to their servants while in the discharge of any duty in connection with interstate commerce.

In the case of *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, in the seventh paragraph of the syllabus, it is held:

> "The common-law rule with respect to the employe's assumption of risk of injury from a defective appliance governs an action brought under the Employers' Liability Act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employes, to the exclusion of any state statutes which, like N. C. Revisal 1905, Sec. 2646, abolished the assumption of risk as a bar or an action by a railway employe for an injury attributable to defective appliances furnished by the employer, since otherwise the subject-matter would be controlled by the laws of the several states, and not by the Federal statute, which, in section 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of the employes contributed to the death or injury of an employe."

Respecting the power of the several states to con-

trol or limit the defense of assumed risk by statutory or constitutional provisions, the Court say:

> "But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the Act of Congress, to control the subject-matter."

The manifest purpose of Congress in taking possession of the subject of the liability of interstate carriers for injuries to their employes was to insure a uniform rule by which such liability should be measured, irrespective of the rules and regulations adopted by the several states with respect thereto. The same purpose—uniformity respecting liability of an interstate carrier—is manifested by Congress, as interpreted by this Court, in the Interstate Commerce Act.

With respect to the objects to be attained by that act, this Court, in *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, say:

> "This branch of interstate commerce was being subjected to a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier

> whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount, and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law, and this purpose will be effectuated, and not impaired or destroyed, by the state courts obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

If plaintiff's case had been tried in Ohio, and three of the jurors, before whom the case was tried, had refused to concur in the verdict, plaintiff could not have obtained a verdict against the defendant in the sum of $16,900. And in that State there would have been a mistrial, or the three dissenting jurors would have forced the other nine to have returned a verdict for a smaller sum.

It is patent, therefore, that the interstate carrier who is sued in Ohio, or in any other state where the concurrence of twelve jurors is necessary to return a verdict, has an advantage over the carrier who is sued in Oklahoma. It is equally patent that the law is not uniform in its application to carriers operating in different states.

If, therefore, it was the purpose of Congress to establish a uniform rule by which the liability of interstate carriers should be measured, on account of injuries sustained by their employed while assisting in interstate commerce, that purpose is defeated by giving effect to Section 19 of Article II of the Constitution of Oklahoma. But, in the Croninger case, *supra*, it is said respecting the diversity of rules by which liability is measured:

> "The congressional action has made an end to this diversity, for the national law is paramount, and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state courts obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

The rule announced by this Court in the case of *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, is practically the same as that announced in the Croninger case. In the Mondou case it is said:

> "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.
>
> "And particularly opposite is the repetition of

that principle in Smith v. Alabama, 124 U. S. 465, 473, 31 L. Ed. 508, 510, 1 Inters. Comp. Rep. 804, 8 Sup. Ct. Rep. 564:

> " 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it its conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the surpemacy of the national authority.'

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Smith v. Alabama, 124 U. S. 465, 473, 480, 482, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. Ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Reid v. Colorado, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The inaction of Congress, how-

ever, in nowise affected its power over the subject. The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. Ed. 654; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. Ed. 910, 15 Sup. Ct. Rep. 802; Southern R. Co. v. Reid, No. 487, 22 U. S. 424, *ante*, 257, 32 Supreme Ct. Rep. 140; Northern Pac. R. Co. v. Washington, No. 136,222 U. S. 370, *ante*, 237, 32 Sup. Ct. Rep. 160."

In commenting upon the jurisdiction of the state courts the Court say:

"Because of some general observations in the opinion of the Supreme Court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or effect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdic-

> tion, as prescribed by local laws, is appropriate to the occasion', because we are advised by the decisions of the Supreme Court of errors that the superior courts of general jurisdiction are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant. * * * We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, **as prescribed by local laws,** is adequate to the occasion."

The primary question to be determined, therefore, is: Has the State of Oklahoma, as prescribed by its Constitution and local laws, a court with jurisdiction "appropriate to the occasion" or "adequate to the occasion"?

In Section 2 of the Act of 1906 it is provided:

> "All questions of negligence and contributory negligence shall be for the jury."

In Section 3 of the Act of 1908 it is provided:

> "But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe * * *."

It is clearly apparent from the foregoing provisions that both parties to a suit arising under the act under discussion are entitled to a jury trial. But suppose that the State of Oklahoma should by constitutional provision abolish all trials by jury and provide that all questions of fact should be determined by the Court—could it be seriously urged that the State courts, thus constituted, were "adequate to the occasion"? To propound the question is to answer it. However, if the State of Oklahoma may provide by constitutional provision that nine jurors concurring may return a verdict in a case arising under this act it may, in the same manner, provide that six jurors, or three jurors, concurring, may return a verdict. And it may likewise, in the same manner, abolish trials by juries altogether. In fact, it is held by the Supreme Court of Oklahoma, in the decision herein, that the state may abolish a trial by jury altogether, the Court saying (Tr., pp. 180, 181):

> "* * * We apprehend that the state has the power to abolish a trial by jury altogether and provide that all questions, both of law and fact, should be determined by the Court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the State court, and he be denied a jury trial in accordance with the state law; yet, if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure

> that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a Federal statute."

The power once conceded, there is no limitation to its exercise.

In the joint brief herein the question as to what kind of jury the act contemplates is fully discussed, and further argument upon that proposition is deemed unnecessary.

I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, State of Oklahoma.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error grew out of a violation of a statutory duty, arising under an Act of Congress, and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not abandon and withdraw all his testimony respecting such alleged violation of said statute.

VI.

The Supreme Court of Oklahoma erred in holding that, after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

Plaintiff's cause of action was brought under the Federal Employers' Liability Act of April 22, 1908, and the Safety Appliance Act of March 2, 1893. He was run over by a string of moving cars, while between the rails immediately in front of same, and he realized that, in order to recover damages for his injuries, it would be necessary for him to explain his being in such an obviously dangerous place. He also knew that he would have to give some excuse for giv-

ing the engineer a stand-still signal, as he claims to have done, after he had given him a stop signal. Therefore, he charged in his petition that the couplers on the two cars which were to be coupled together were defective and could not be operated by the levers with which they were equipped; hence, the necessity for the stand-still signal, and his presence between the rails in front of the moving cars. But this claim was so conclusively refuted by the defendant's testimony that the Court, at plaintiff's request, charged the jury as follows (Tr., p. 150):

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

By abandoning and withdrawing the charge and claim that the couplers were defective plaintiff swept away every pretext and every excuse for giving a stand-still signal, and he likewise swept away every pretext and every excuse for placing himself between the rails in front of the moving cars. If the couplers were not defective, then there was no reason for him to give a stand-still signal, and no excuse for his going in between the rails to adjust the coupler on the car which ran over him.

Plaintiff swore positively, in his direct examination, that the couplers were defective. He reiterated this statement on cross-examination; and yet, after defendant had put on its evidenec and overwhelmed him with its volume and weight, he requested the Court to give the foregoing instruction, which was tantamount to an admission on his part that his testimony respecting the condition of the couplers was untrue. In going into the place he did he violated the rules of the defendant, violated his agreement with the defendant to obey the rules, and violated the clearly expressed legislative intent of Congress.

In the case of *Gilbert v. Burlington, C. R. & N. Co.*, 128 Fed. 529, Judge Thayer, speaking for the Court, at page 539, said:

> "I think that the Act of Congress which was passed for the protection of brakemen amounts to a legislative declaration that a brakeman ought not to step in between the rails to uncouple a car in a moving train, and when it appears that a brakeman has placed himself in such a situation unnecessarily, not being compelled to do so by stress of circumstances, and receives an injury, he is guilty of such negligence as prevents a recovery. The testimony in the case at bar, as I view it, shows that the plaintiff stepped in between the rails when the train was moving, without adequate excuse for so doing, and that this act on his part beyond controversy immediately contributed

to his injury, and the court below properly instructed the jury that he could not recover."

We respectfully submit that, in withdrawing his charge of negligence respecting the condition of the couplers, plaintiff necessarily withdrew and abandoned all the evidence offered in support of that charge. He necessarily withdrew and abandoned the evidence respecting the giving of the stand-still signal claimed to have been given to the engineer; because if the couplers were not defective there was no excuse or reason for his giving this unusual and extraordinary signal. Respecting this signal he says:

"Q. [illegible] it necessary or usual to give him (the engineer) another sign after you had given him a stop signal?

A. It sometimes insures greater impression. He is liable to take some other fellow's signal than yours.

Q. He was following your signals that morning, wasn't he?

A. He was supposed to." (Tr., pp. 61, 62).

The alleged defective couplers were the excuse he invented for giving that signal, and the excuse fell with the withdrawal of the charge respecting the couplers, and this evidence was withdrawn. Again, the condition of the couplers was the excuse for his going between the rails and taking hold of the knuckle

with his hand, but this excuse and this evidence are likewise withdrawn and abandoned. Any other holding than that the foregoing evidence was necessarily withdrawn and abandoned, with plaintiff's withdrawal of the charge of negligence respecting the couplers, would be preposterous.

In *Artz v. C., R. I. & P. Ry. Co.*, 34 Ia. 154, the Court said:

> "But it is urged by appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not, and this testimony shows that he was not guilty of contributory negligence, or at the very least it made it a question of fact for the jury. The difficulty, however, with this position is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes therefore no conflict. Suppose the fact is conceded that the sun is shining bright and clear at a specified time, and a witness having good eyes, should testify that, at the time, he looked and did not see it shine, could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity, and possibly even he may testify to it with the self-consciousness of integrity, but after all, in the very nature of things, it cannot be true,

and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict."

As suggested by the Court in the foregoing case, plaintiff may have been told that it was necessary for him to say that the couplers were defective, and therefore he gave the engineer a stand-still signal; that because they were defective he went in between the rails to life the pin and adjust the knuckle. He may have thought of these things with a desire that they be true; he may have made himself first believe that they were true, and this belief may have ripened into a conviction of their verity; and, possibly, even he may have testified to them with the self-consciousness of integrity. But after all, in the very nature of things, having conceded that the couplers were not defective, they cannot be true, and hence cannot, in law, form any basis for a conflict upon which to rest a verdict, or furnish the basis for any evidence reasonably tending to support the verdict.

We submit further, that from the evidence of plaintiff and other witnesses, and from the physical facts proved, there was no necessity for plaintiff to have given a stand-still signal, and no necessity for him to have gone in between the rails; and that he was not injured at the place he claims, or in the manner he claims.

There was no necessity for him to have given the stand-still signal.

First. Because he admits that the couplers were not defective.

Second. Because he had not tried to operate the coupler on the car that struck him, and he had no reason, therefore, to believe that it would not operate by the use of the lever.

The Court will bear in mind the fact that just prior to the accident the engine pushed a string of cars in on the stave mill track; that plaintiff rode the cars in on this track, cut off those that were to be left on the track, and then claims to have given the engineer a go-ahead signal; that the engine was to go back on the passing track, clear the switch, and then back east and couple on to a string of stationary cars. Plaintiff claims to have ridden the rear car a short distance as the engine started to leave the stave mill track, and says he then dropped off and walked diagonally across to the stationary cars on the passing track; that he tried to operate the coupler on the west car of the string, and that he was unable to do so. Continuing, he says:

"Q. Then what did you do?

A. I turned around, facing the west on the north side of the passing track, **and gave the engineer the stop signal.**

Q. Where was he then?

A. He was in the cab.

Q. I mean where was the train, east end of the train?

A. When I gave him the stop signal the train was just pulling through the switch; the hind truck of the car was just about half way over the switch.

Q. You mean where the track connects with the passing track?

A. Yes, sir; **and it takes some time to stop there,** and by the time he stopped he was somewhere between four to seven feet, to the best of my judgment, west of the spur switch.

Q. West of where the spur——

A. Intersects the passing track.

Q. Then what did you do?

A. **I gave him the stop signal and I walked on up—it wasn't but about three steps or something like that—and lined up the switch**" (Tr., p. 45).

When he lined up the switch he had no reason to suspect or to believe that the coupler on the car that ran over him would not work. Therefore, no occasion had arisen requiring him to give an unusual and extraordinary signal. The usual and customary thing for him to have done would be to give a back-up signal as soon as the switch was lined up, and, while the engineer was reversing the engine and starting back, to cross the track ahead of the car and operate the lever from the south side as the car moved along. **This is unquestionably what he attempted to do, but he evidently slipped and fell between the rails and was overtaken by the car before he could get in the clear.**

Three. Because if he had given any such signal the

engineer would have seen it, since plaintiff says the engineer was looking at him, and Robinson, a witness called by plaintiff in rebuttal, says the engineer was looking toward Brown.

No necessity existed requiring that plaintiff should have gone in between the rails to operate the coupler with his hand.

On cross-examination, respecting his movements after lining up the switch, plaintiff says:

> "Q. You say you gave him this stop signal and then immediately went around behind the car?
>
> A. Yes, sir.
>
> Q. What was the first thing you did after you went in?
>
> A. Taken hold of the lifting pin on the south side of the car.
>
> Q. Did you go across the track?
>
> A. No, sir; practically across.
>
> Q. And you stood on the track and reached over for the lever, like this?
>
> A. I suppose you would call it reaching; I was partially on the south side of the track (Tr., p. 62).
>
> * * * * * * * *
>
> Q. So you go out to the south side of the track and while still on the track grasp the knuckle with the left hand?
>
> A. Yes, sir.
>
> Q. And then grasp the knuckle with the right hand?
>
> A. Yes, sir.
>
> Q. And while operating the lever with the left

hand you gave the knuckle a pull with the right hand?

A. Yes, sir.

Q. And just then you heard the car coming?

A. Yes, sir.

Q. And immediately then you started to get off the track?

A. Never did get to make a start, only in my mind" (Tr., p. 62).

From the foregoing testimony it will be observed that plaintiff stepped between the rails, facing west, placed his left hand on the lever and his right hand on the knuckle and was in the act of lifting the pin when the cars started moving. **He had not tried to operate the coupler by using the lever while standing south of the track in a place of safety; and there being no evidence that he could not have operated it in that manner, no necessity existed requiring him to go between the rails.** It is possible that plaintiff was doing just what he says he was doing when he heard the cars start to move; but, if he was, he had given no spot or stand-still signal, and had carelessly stopped to operate the coupler in that manner, and in attempting to get out from between the rails, slipped and fell. In any event, he was in a place where he had no business to be, and in placing himself there, he assumed the risk of being injured.

Plaintiff says when he gave the engineer a stop signal that the rear trucks of the last car were about half

way over the switch, and that it takes some time to stop there; that the east end of the car was from 4 to 7 feet west of the switch where it stopped. He also says that from the west end of the stationary string of cars to the switch was about three steps, or something like that. This would make the two cars that were to be coupled together, about 13 to 17 feet apart, estimating his three steps at 9 feet. He also says that when he heard the cars coming he stepped to the left, which would have been south; that he was struck and knocked down, and rolled over once and his foot was caught, the truck passing over it; and that he removed his foot before the next truck struck it. If the car were from 4 to 7 feet west of the switch, then plaintiff was struck that far west, because he did not step east when he attempted to get away; and, from his own description of what happened, he could not have been east of the switch when the car ran over him. But the undisputed testimony shows that he was injured at a point from 20 to 25 feet east of the switch. It also shows that the space between the two cars that were to be coupled was from 100 to 160 feet; that the car that struck him had moved from 25 to 30 feet before striking him; thereby showing conclusively that **plaintiff did not stop immediately behind the car as it stood still, from 4 to 7 feet west of the switch; but that he must have been walking along ahead of the car and fell between the rails, and could not get out of the way until he was run**

over. Chamberlain says the cars were standing about 3 or 4 car lengths apart, which would be from 120 to 160 feet apart, estimating the length of the car at forty feet. The conductor says that, after Brown got hurt and the cars were stopped, they were from fifty to seventy-five feet apart (Tr., p. 102). N. E. Jacques says that after the accident the cars stood about 150 feet apart (Tr., p. 121). The engineer thinks he had moved the cars back about four car lengths, after starting, before he stopped. This evidence shows that the cars were moved a considerable distance, after starting, and that they must have been from fifty to one hundred feet apart, even after the accident.

Again, there was no blood found except at one point on the rail and then a pool just south of that point on the ground. The conductor says the blood on the rail was from twelve to thirteen feet east of the switch point (Tr., p. 98). Godbold places it at from fifteen to twenty feet east of the switch point (Tr., p. 114). Jacques says it was from twelve to fifteen feet east (Tr., p. 121). D. M. Baldwin measured the distance with a tape line and says that the blood on the rail was ten and one-half feet east of the switch point (Tr., p. 131). The switch point being fifteen feet east of the switch stand, would make the distance from the stand twenty-five and one-half feet, plus four to seven feet, which would make the distance from where the car was standing twenty-nine and one-half to thirty-three

and one-half feet to the point where plaintiff was injured.

The foregoing evidence shows conclusively that plaintiff **was not standing at the end of the car from four to seven feet west of the switch when he was struck, but that he was walking along down the track, and was overtaken by the cars, after he had slipped and fallen.** This evidence also corroborates the evidence of Godbold and Chamberlain as to what actually took place. Godbold says Brown rode the cars out from the stave mill track up to the switch, and that he dropped off there (Tr., p. 112). Godbold also says that the west end of the stationary cars was four car lengths east of the switch. It would have been the natural and customary thing for Brown to ride them out. His duty was to follow the engine; the switch had to be thrown. Why, therefore, would he have gotten off the cars and gone from 100 to 200 feet east of the stationary cars, and then walked back the same distance to throw the switch? It is unreasonable. His whole story, predicated upon the defective couplers, as the excuse for his action, as carefully prepared as it is, sounds absurd and unreasonable, as applied to practical railroading. But, with the defective couplers out of it, it is wholly unbelievable. Chamberlain says that Brown gave him a stop signal, lined up the switch, and then gave him a back-up signal, and passed in behind the cars, going across the track; that he saw nothing more

of him until after he was hurt. Again, plaintiff says he slipped and fell, and was run over. He made this statement to Baird, the fireman (Tr., p. 95); also to Godbold (Tr., p. 115) to Pierce, the conductor (Tr., p. 119), and also to Jacques (Tr., p. 119). Also, in a written statement made in July. But on the witness stand he said he was knocked down.

From the foregoing facts disclosed by the record it clearly appears that **the plaintiff had placed himself in a position of known danger, and in so doing conclusively assumed the risk of injury incident to such position.**

Plaintiff's case was submitted to the jury under the provisions of the Employers' Liability Act alone, and the defense of assumption of the risk was therefore available to the defendant.

Grand Trunk R. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838;

Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564;

Mondou v. N. Y., N. H. and H. R. Co., 223 U. S. 1, 56 L. Ed. 327;

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062.

But the Supreme Court of Oklahoma, in its opinion herein, says (Tr., p. 179):

> "Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an Act of Congress, the rule seems to be that

> the assumption of risk is not a defense, and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the Court would not have been warranted in submitting this issue to the jury. The fact that the Court may have committed error in charging the jury on this point, under such circumstances, would not warrant a reversal. Inasmuch as we hold there is no substantial error in the Court's instruction affecting the defendant's right, it is not necessary to enter into an elaborate discussion of this proposition."

The foregoing is in conflict with the holding of this Court in the cases above cited.

In the opinion of the Supreme Court of Oklahoma it is also held (Tr., p. 178):

> "It is next insisted that the Court should have directed a verdict for the defendant, for the reason, it is claimed, that the testimony conclusively shows that plaintiff's injury was due to an assumed risk. It is insisted that this cause of action, having been based upon the Federal Employers' Liability Act, it superseded the provision of our Constitution, and therefore is a question of law for the Court to determine and in this case should not have been left to the jury. We have examined the evidence carefully and are of the opinion that the Court did not err in refusing to instruct the jury to return a verdict for the defendant. Under the general law, and independent of the provision of our Constitution, where the question of assumption of risk depends upon a controverted issue of fact, it is a

question to be submitted to the jury, like all other questions of fact. There was sufficient testimony before the Court and jury to warrant the Court in submitting the issue of the assumption of risk to the jury and the trial court having approved their verdict, it will not be disturbed by us."

This conclusion of the Supreme Court of Oklahoma is predicated upon its previous conclusion respecting the evidence as to the condition of the couplers, which we contend was withdrawn from the jury when the charge of negligence respecting the condition of the couplers was abandoned. The Court said (Tr., p. 174):

"The 3rd, 4th, 11th and 13th assignments challenge the action of the Court in overruling the demurrer to the evidence and overruling the motion for a directed verdict. The basis of defendant's contention is that when the Court, at the request of plaintiff, withdrew from the consideration of the jury that part of his cause of action relating to defective couplers plaintiff thereby withdrew from the consideration of the jury all testimony relating thereto, and hence the effect of which was to leave the case in such condition to show that plaintiff was guilty of contributory negligence and that all of his testimony bearing upon his cause of action, under the employers' liability law, is unreliable and should not be given any weight. It is contended that the only logical conclusion is that in withdrawing from the consideration of the jury his cause of action, based upon defective couplers, after he had testified, is a conclusive ad-

mission on his part that the testimony given by him relating to his cause of action under the employers' liability law was false, and hence leaves no reliable testimony for the consideration of the jury tending to sustain his cause of action. In this conclusion we are unable to agree. These things may materially, but not necessarily, affect plaintiff's credibility as a witness, and the weight which might otherwise be given to his testimony, certainly it does not necessarily follow that his testimony is, as a matter of law, false. Had he only alleged a cause of action under the employers' liability law his testimony as to the defective couplers would have been competent for the purpose of showing a state of facts which justified him in going between the cars, where he claimed he was at the time he was injured. This testimony would have been proper for the purpose of showing that he did not contribute to his own injury. Instead of this being conclusive proof that his testimony upon this point was false, or that he was mistaken in the couplers being defective, it may be that this part of his cause of action was withdrawn from the consideration of the jury by his counsel over his protest and while still contending that the couplers were in fact defective. If only one cause of action had been alleged, as we have shown, it would have been perfectly proper for the plaintiff to have testified to the defective condition of the couplers, justifying his conduct in being between the cars at the time of the injury as tending to show that he was not guilty of contributory negligence."

At plaintiff's request the trial court charged the jury as follows:

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim **that plaintiff's injuries were caused, in whole or in part,** by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

This is not only an admission that the couplers were in good condition and operative, but it is vastly more than that. **Plaintiff states emphatically, without qualification or reservation, that the condition of the couplers was not responsible for his injuries, directly or indirectly, in whole or in part. He admits and confesses that, in so far as the condition of the couplers was concerned, it was not necessary for him to have gone in between the rails to operate them, and not necessary for him to have given the unusual and extraordinary "spot" or "stand-still" signal.**

To illustrate: A man is charged with murder. It is admitted that he shot his victim. He interposes a plea of self-defense, gones on the witness stand and swears that his victim attacked him with a large knife, and describes it in detail; describes how he was being pursued by his victim, and, when he was finally driven into a corner, he fired the fatal shot to save his life. Then, after the evidence is all in, he withdraws his plea of self-defense. What is the result? **The withdrawal of**

the plea of self-defense is an admission that his victim had no knife; that he was not being pursued by him; and that he did not shoot to save his own life. If the withdrawal of the plea of self-defense is not an admission that the evidence in support of it is untrue, the withdrawal of the plea, in any event, withdraws the evidence; and the accused, in so far as that plea is concerned, is left without an excuse for the killing of his victim.

From the foregoing facts, and under the authorities cited, it follows that the trial court erred in refusing to direct a verdict for the defendant, as prayed (Tr., p. 147); and that the Supreme Court of Oklahoma erred in holding that the trial court did not err in refusing to direct such verdict (Tr., p. 178). This denies defendant a right arising under the Federal Act.

It is the duty of the trial judge to withdraw the case from the jury and to direct a verdict, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Choctaw, O. & G. R. Co. v. Laura McDade et al., 48 L. Ed. 96;

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 496, 35 L. Ed. 213, 11 Sup. Ct. Rep. 596;

Phoenix Mut. L. Ins. Co. v. Doster, 106 U. S. 32, 27 L. Ed. 65, 1 Sup. St. Rep. 18;

Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840;
Randall v. Baltimore & O. R. Co., 109 U. S. 478; 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322;
Schofield v. Chicago, M. & St. P. Ry. Co., 114 U. S. 615, 29 L. Ed. 224, 5 Sup. Ct. Rep. 1125;
North Penn. R. Co. v. Commercial Natl. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. Rep. 266.

That plaintiff assumed the risk of dangers ordinarily incident to his employment as brakeman we assume will be conceded and for that reason we shall not enter upon a discussion of this proposition, but we shall simply invite the attention of the Court to a few authorities.

In *Narramore v. Cleveland, C. O. & St. L. Ry. Co.*, 96 Fed. 298, it is said:

> " 'Assumption of risk' is a term of the contract of employment express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to

protect him from dangers, the risk of which he agreed expressively or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk and is well supported by the judgments of Lord Justices Bowen and Dry in the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in *Smith v. Baker* (1891), App. Cas. 325, and *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161."

Sans Bois Coal Co. v. Janeway, 99 Pac. 153, 32 Okl. 425;

Coalgate v. Hurst, 25 Okl. 588, 107 Pac. 657;

Tuttle v. Detroit G. H. & M. Co., 122 U. S. 189, 30 L. Ed. 1114;

Kohn v. McNulty, 147 U. S. 241, 37 L. Ed. 152;

South. Pac. Ry. Co. v. Seeley, 152 U. S. 153, 38 L. Ed. 395;

Morris v. Duluth S. S. & A. R. Co., 108 Fed. 747;

Gilbert v. Burlington C. R. & N. C. Co., 128 Fed. 529;

Choctaw, Etc., R. Co. v. McDade, 191 U. S. 64;

William v. Choctaw, Oklahoma & G. R. Co., 149 Fed. 104;

Burke v. Union Coal & Coke Co., 157 Fed. 178;

Washington, Etc., Co. v. McDade, 135 U. S. 554.

That plaintiff assumed the risk of obvious dangers, such as stepping between the rails in front of a moving train, or in attempting to couple cars, or to prepare the train for coupling, by standing between the rails, and the like, is equally as well settled and needs no citation of authorities in support thereof.

In *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, *supra*, this Court, respecting the assumption of risk, say:

> "Some employments are necessarily fraught with danger to the workman—danger that must be confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. Choctaw, O. & G. R. Co., v. McDade, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep, 230; Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 55 L.

Ed. 596, 31 Sup. Ct. Rep. 561; T. & P. Ry. Co. v. Harvey, 228 U. S. 319, 57 L. Ed. 852, 33 Sup. Ct. Rep. 518; Gila Valley G. & C. R. Co. v. Hall, 232 U. S. 94, 102, *ante* 521, 34 Sup. Ct. Rep. 229, and cases cited."

Plaintiff does not claim to know at what point on the track he was injured, but he does say that the rear car attached to the engine stopped from four to seven feet west of the switch-stand; that he stepped in behind this car, and that as he was adjusting the knuckles he heard the slack being taken up and attempted to get out of the way; that before he could do so the car struck him, and he was knocked down. If this statement be true, he must have been injured west of the switch-stand, but the physical facts, as testified to by all of the train crew, and which are not controverted, show that he was injured from ten to fifteen feet east of the switch-stand (Tr., p. 144), which shows conclusively that he must have been walking along the track ahead of the moving cars, and fell, or that he was overtaken and knocked down by the cars. In either event he assumed the risk of being injured by placing himself in so perilous a position, and defendant's motion to direct a verdict should have been sustained. It is submitted that for this reason the State Supreme Court erred in affirming the judgment.

VII.

The Supreme Court of Oklahoma erred in holding that instruction No. 13, given by the trial court to the jury, was not erroneous (Tr., p. 11); **said instruction being quoted in full under this assignment of error, at page 25 herein.**

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury instruction No. 12, requested by defendant (Tr., pp. 12, 13); **said instruction being quoted in full under this assignment of error at page 20 herein.**

If plaintiff was entitled to recover at all his recovery should have been measured by the standard prescribed by the Act of Congress under which his action was prosecuted. But the trial court, we submit, failed to give the jury any standard by which to measure his damages.

In *Seaboard Air Line Ry. Co. v. Tilghman*, 237 U. S. 498, 59 L. Ed. 1069, it is held:

> **"Damages — Diminution — Comparative Negligence.**
>
> "1. The direction in the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sections 8657, 8659), Section 3,

that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employe, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

"Trial — Instructions — Damages — Comparative Negligence.

"2. Proper effect is not given to the provisions of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Section 8657, 8659), Section 3, that contributory negligence of the employe shall not bar a recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, by an instruction leaving to the jury the matter of diminishing the damages in such case, without naming any standard to which their action shall conform other than their own conception of what is reasonable."

In the body of the opinion it is said:

"No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employe with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed

to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made, and the jury should have been advised of that rule and its controlling force."

While it is true that the trial court instructed the jury in practically the language of the statute with the substitution of the word "reduce" instead of "diminish", yet the Court failed to define the meaning of the word "proportion" and failed to define or fix any standard by which the damages should be measured. The instruction given (No. 13) falls within the character of charges condemned by this Court in *Seaboard Air Line v. Tilghman, supra.*

This Court has frequently referred to reports of committees and debates in Congress to ascertain the intention of Congress in passing an act. In this connection it will be observed that the report of the Committee of the Judiciary of the House of Representatives, dated April 4, 1908 (60th Congress, First Session, Report No. 1386), to accompany H. R. No. 20310, which, in so far as section 3 is concerned, is the same as the Act of April 22, 1908, quoted authority to the effect that section 3 "is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice if juries could

be trusted to act upon it." Further, at page 4 of the act, it was said:

> "We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. * * * Comparative negligence is absolutely wrong in principle. * * * We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employe to recover full damages for injury to which his own negligence contributed in some degree."

It may thus be fairly contended that it was the intention of Congress to reject the doctrine of comparative negligence and to adopt the admiralty rule. That such was the intention of Congress is clearly apparent from a comparison of the two acts; that is, the Act of June 11, 1906, with that of April 22, 1908. In section 2 of the former act it is provided:

> "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury."

In section 3 of the latter act it is provided:

> "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

The first act clearly provides for the rule of "comparative negligence"; and it is equally clear that the last act provides for the "admiralty rule". It would seem, however, that the House Judiciary Committee had some doubt as to the ability of juries to apply the "admiralty rule" and we submit that, without some explanation of its application, juries ought not to be permitted to guess what Congress meant.

The instruction in the instant case is objectionable, because the Court did not instruct the jury as to the meaning of the word "proportion" as used in the statute, respecting the damages which plaintiff was entitled to recover in the event the jury should find that plaintiff was negligent and that his negligence contributed to his injury. Also, in that it invited the jury to apply the doctrine of comparative negligence in assessing plaintiff's damages, which is not the measure of damages prescribed by the statute.

This instruction had its exact replica in an instruction passed upon by the Supreme Court of Kentucky in the case of *Nashville Railroad Co. v. Banks*, 161 S. W. 554. The instruction in that case was numbered four,

and appears in full at page 556 of the opinion, and is in full as follows:

> "Although you may believe from the evidence in this case that defendant was guilty of negligence on the occasion complained of, and as defined to you by instruction No. 1 herein, yet if you shall further believe from the evidence that plaintiff was also guilty of negligence in the performance of his duties as brakeman at the time complained of by him, then he is chargeable with contributory negligence, and if you shall believe from the evidence in this case that plaintiff was guilty of negligence as mentioned to you in this instruction, and that such negligence on his part contributed to bring about the injuries to him and but for which he would not have been injured, then you will diminish the damages, if any, you may assess in his favor, in proportion to the amount of negligence, if any, attributable to him in causing or producing the injury complained of by him."

The holding of the Court on this instruction is indicated by the fourth paragraph of the syllabus quoted herewith:

> **"Negligence (S. 101*)—Injury to Servant—Contributory Negligence — Federal Employers' Liability Act.**
>
> "Under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322), declaring that contributory negligence shall not bar a recovery, but the dam-

age shall be diminished in proportion to the negligence of the injured employe; an employe sustaining a personal injury cannot recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the railroad company bears to the entire negligence attributable to both, and an instruction that, if the employe was guilty of negligence which contributed to his injuries, the jury must diminish the damages in proportion to the amount of negligence attributable to him in producing the injury, is erroneous."

The objection to this instruction is clearly covered in the decision and opinion of the Kentucky case, restated in our own way perhaps not so clearly. The vice of the instruction is, in our opinion, twofold:

First: It invites the jury to apply the doctrine of comparative negligence; and,

Second: It does not give them any intelligent rule by which to assess in the event that the plaintiff's negligence partially produced the accident or contributed thereto. In other words, it says that the jury should diminish the damages in proportion to the amount of negligence attributable to the plaintiff, but it does not say what that negligence shall be in proportion to or what the amount of damages shall be diminished by. Stated in another way, the statutory rule is a rule of proportion, and the instruction does not give the terms of that proportion. Couched in the language of

mathematics, the rule is this: As the defendant's negligence is to the whole negligence (consisting of the negligence of the defendant and the negligence of the plaintiff) so shall the plaintiff's verdict be in proportion to the whole damage suffered by the plaintiff; or the same result is arrived at by a different combination of words, as follows: As the plaintiff's negligence is to the whole negligence so shall the plaintiff's damages be diminished in proportion to the whole damage which he suffered.

The above is squarely the rule of damages obtained and applied in the admirality courts and is not the rule at common law at all. The rule in admiralty courts has been, from the earliest English decisions, that the judges in admiralty will undertake to measure without regard to any stated standards of liability the relative degree of negligence of the parties involved in tort cases, and in so doing they will distribute the damages between such parties on a basis of equity.

Katherine v. Dickerson, 17 How. 170;
Max Morris, 137 U. S. 1;
Atlee v. Packett Co., 21 Wall. 389;
Smith v. Serapis, 49 Fed. 393.

The language which the trial court used in this instruction shows clearly that the Court did not grasp the meaning of the language employed in the act and did not appreciate what Congress was driving at and what Congress was endeavoring to accomplish; and for

that reason failed to use such language as would give the jury an adequate idea of their duties under the statute. The Court no doubt conceived of the statute as putting in effect what is known as the "comparative doctrine of contributory negligence". This is a doctrine which has flourished in but one jurisdiction in this country—Illinois—and has been applied to a limited extent in but two others—Tennessee and Kansas. That the doctrine of comparative negligence is a very different thing from the rule put in force in this act is apparent from the decisions of those states:

C., B. & Q. R. Co. v. Johnson, Admr., 103 Ill. 512;

Calumet Iron and Steel Co. v. Martin, 115 Ill. 358.

In the Johnson case the following instruction of the Court was approved:

> "But if the jury believe from the evidence that Johnson did not exercise ordinary care, yet that Johnson's negligence was slight and that the negligence of the defendant was gross in comparison with each other, then the plaintiff must recover and the verdict must be for the plaintiff."

In other words, under that doctrine it becomes the province of the jury to compare the negligence of the plaintiff and the defendant and if the jury finds that the defendant was negligent and finds that the plaintiff

was negligent, but further upon a comparison of the negligence of the two parties finds that the plaintiff's negligence be slight and that the negligence of the defendant was gross, then, notwithstanding the slight negligence of the plaintiff, the verdict is for him. Under such an instruction and under such a law the jury determines liability by comparison of the negligence of the parties; having determined liability, it then assesses the full damages which the party has suffered, or assesses nothing. There is no half-way or middle ground.

It can thus be seen how very different the rule of comparative negligence, as laid down by the Illinois decisions, is from the rule of diminution of damages as laid down in the Federal Act.

The doctrine of comparative negligence, as held in the Tennessee courts, has exemplification in the following cases:

Whirley v. Whiteman, 1 Head Rep. 623;
Railroad v. Humphreys, 12 Lea. 200;
Railroad v. Fleming, 14 Lea. 130;
Railroad v. Fain, 12 Lea. 35;
Railroad v. Gurley, 12 Lea. 46.

The Kansas cases are as follows:

Kansas R. R. Co. v. Peary, 29 Kans. 169;
Railroad v. Morgan, 31 Kans. 77;
Railroad v. Henry, 57 Kans. 154.

There are therefore for consideration by the courts the three distinct rules covering contributory negligence:

(1) The common-law rule wherein the slight contributory negligence on the part of the plaintiff bars recovery completely.

(2) The comparative rule of contributory negligence permits the plaintiff to recover full damages if the negligence, as compared with the negligence of the defendant, is slight and the defendant's negligence is gross.

(3) The admiralty rule of contributory negligence that in no event shall the contributory negligence of the plaintiff bar recovery, but that his contributory negligence shall be considered and its proportion to the entire negligence determined in order that the proportion of the damages which the party shall assume may be determined, each party bearing such proportion of the damages as each party's negligence bears to the whole.

It is submitted that defendant's requested instruction No. 12 (Tr., pp. 12, 13) fairly defined the rule to be followed, and its refusal was error.

But, in the case at bar, we have practically a "quotient verdict". Mr. Best, foreman of the jury, testifying in support of defendant's motion for a new trial, said:

"Q. Having reached a conclusion that the

plaintiff should recover, then what method did you adopt to find the amount?

A. The question was put to each man who was a member of that jury, the amount. This one said so much, this one so much and this one so much and so on around, until we passed to the twelve, each man stating the amount that he thought he ought to recover.

Q. Who asked that? You, as foreman?

A. Yes, sir.

Q. All right; go ahead.

A. And after the question had gone around and I had put the amounts of each man on the paper—I wasn't asked to do that, but I just wanted to see how the jury stood on it; and after we got through some member of the jury asked me if I was making a notation of the amount each one stated that should be recovered. I said yes. He asked me to state what it aggregated. I summed up and it aggregated $16,900.

Q. You mean the total sums added together gave you $16,900.00?

A. The total sums added together and divided by twelve.

Q. The total amounts added up and divided by twelve made after the division——

A. $16,900.00.

Q. That was the amount of the verdict returned, was $16,900.00?

A. Yes, sir" (Tr., p. 160).

It would seem from the foregoing and from the testimony of the foreman of the jury that the amount of

plaintiff's recovery was arrived at by means of a quotient verdict rather than by the rule provided in the Act of Congress under which the case was prosecuted, and this method is clearly unauthorized.

From the facts disclosed by the record, and under the authorities cited herein, we respectfully submit that the judgment of the Supreme Court of Oklahoma should be reversed, annulled and held for naught.

Respectfully submitted,

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March 11, 1916.